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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT;

Petitioner,
vs.
UNITED STATES OF AMERICA AND
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

OPINION

Appeal from the United States District Court for the District of Nevada

Lloyd D. George, District Judge, Presiding

Argued and Submitted

December 11, 2000 – San Francisco, California

Filed July 5, 2001

Before: Mary M. Schroeder, Chief Judge, John T. Noonan and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher;

Dissent by Judge Noonan

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY

Real Estate/Water Rights

The court of appeals reversed a judgment of the district court. The court held that the 1902 withdrawal of land from public entry for the federal Newlands Reclamation Project (Project) in Nevada did not initiate the appropriation of a water right subject to protection under the Nevada anti-forfeiture statute.

Appellee town of Fernley, Nevada, applied to the Nevada State Engineer to change the manner and place of use of 26 separate water use permits in the Project. The federal government operated the Project, but water rights in the project were held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The reservation of Appellants Pyramid Lake Paiute Tribe of Indians (Tribe) surrounded Pyramid Lake. The Tribe opposed the application on the basis that the current flow of the Truckee River into Pyramid Lake would be diminished if the application were granted, thus adversely affecting the Tribe's economy, culture, and hentage. The United States joined the Tribe

in opposition to the transfer. The Tribe and the government contended that the water rights at issue no longer existed because the prior holders of those rights failed to exercise them for an extended period of time, and thus the water rights were forfeited under Nevada statutory law, or alternatively, were abandoned under Nevada common law.

The State Engineer rejected the Tribe's forfeiture argument, concluding that the rights at issue were exempt from forfeiture under the anti-forfeiture statute, as the appropriation of the rights was "initiated" in 1902, when the United States initiated the Project. He further found that the rights were not abandoned under the common law as Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and absent such a presumption the Tribe had produced no evidence of abandonment.

The Tribe and the government appealed the State Engineer's ruling to federal district court. The district court affirmed the State Engineer's decision. The Tribe and the government appealed.

[1] The Nevada forfeiture statute, which took effect on March 22, 1913, provides that a water right is forfeited if it is shown not to have been exercised for five successive years. However, under an anti-forfeiture provision, forfeiture does not apply to water rights that were vested, or for which appropriations were initiated, before the forfeiture statute took effect.

[2] In order for a given right to receive the protection of the anti-forfeiture provision, an individual landowner must have taken affirmative steps to appropriate water for his or her own use by the statute's effective date. At the very least, he or she must have contracted with the federal government for delivery of Project water prior to that date. Thus, the State Engineer erred in concluding that all water rights were initiated as of 1902. The district court made the same error in concluding that because each individual Project water right had a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of the

anti-forfeiture statute, on that same date.

[3] Water rights exempted under the anti-forfeiture statute are subject to the common law principle of abandonment, which requires a showing of subjective intent on the part of a water-right holder to give up that right. [4] Under Nevada case law, although a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, such non-use does not raise a rebuttable presumption of intent to abandon. [5] Abandonment is determined from all the surrounding circumstances. Where there is evidence of a substantial period of non-use combined with evidence of the construction of structures which are inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. Where, on the other hand, there is only evidence of non-use combined with the finding of a payment of taxes or assessment, there will not be clear and convincing evidence to establish abandonment.

Judge Noonan dissented, writing that the anti-forfeiture statute exempted the water rights at issue, as the initiation date for all of those rights was 1902, at the time the United States began the Project.

COUNSEL

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David Creekman, Carson City, Nevada, for defendant-appellee The State Engineer.

OPINION

W. FLETCHER, Circuit Judge:

The town of Fernley, Nevada, has applied to the Nevada State Engineer to change the manner and place of use of rights to roughly 280 acre-feet of water from the federal Newlands Reclamation Project. The Pyramid Lake Paiute Tribe of Indians and the federal government oppose the proposed transfers, contending that the water rights at issue have been forfeited or abandoned under Nevada state law. The district court affirmed the decision of the Nevada State Engineer that none of the water rights had been forfeited or abandoned. We reverse and remand for further proceedings.

I. Factual Background

The Newlands Reclamation Project ("the Project") diverts the flow of the Truckee and Carson rivers to supply the needs of water users in Nevada. The Project has two divisions,

named after the two rivers. At Derby Dam, the Project diverts part of the flow of the Truckee River southward through the Truckee Canal to join the Carson River at Lahontan Reservoir. From Lahontan Reservoir, the augmented Carson flows east, where its water is distributed to users in and around the city of Fallon, in what is known as the "Carson Division" of the Project. The Project also diverts part of the water in the Truckee Canal before it reaches the Lahontan Reservoir. The water from this diversion is distributed to users in and around the town of Fernley, in what is known as the "Truckee Division." Water from the Truckee River that is not diverted through the Truckee Canal into either of the divisions flows north into Pyramid Lake. The federal government operates the Newlands Project, but water rights in the Project are held by individual landowners pursuant to contracts between the landowners and the Department of the Interior. The nature and extent of those water rights are determined, in large part, by Nevada state law.

The town of Fernley seeks to satisfy its growing water needs by acquiring water rights in the Truckee Division of the Project. This water

has historically been used for irrigation purposes, but Fernley would use it for municipal and industrial purposes instead.[1] Fernley filed an application with the Nevada State Engineer to change the manner and place of use of 26 separate water use permits it has acquired, totaling roughly 280 acre-feet of Project water. This is a relatively small transfer, but it raises questions common to many other transfers contemplated by Fernley.[2]

The Pyramid Lake Paiute Tribe of Indians ("the Tribe") resides on a half-million acre reservation in Nevada that surrounds Pyramid Lake, a body of water the Supreme Court has described as perhaps "the most beautiful desert lake in North America." *Nevada v. United States,* 463 U.S. 110, 114 (1983). Pyramid Lake once received the entire flow of the Truckee River, but it now receives only what remains after the river has been tapped by the Newlands Project. In years past, Project diversions have adversely affected the size and ecology of the lake, threatening several varieties of fish, one of which (the cui-ui) is an endangered species. If Fernley' s transfer application is granted, its water rights will be

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[1]Congress authorized municipal use of Project waters in the Truckee- Carson-Pyramid Lake Water Rights Settlement Act. Pub. L. No. 101-618 ° 209(a)(l), 104 Stat. 3289 (1990).

[2]2We note that Nevada has recently revised Nev. Rev. Stat. § 533.060 and Nev. Rev. Stat. § 533.037, pertaining to forfeiture and abandonment. These revisions, however, do not affect this case because they do not apply to water rights that have been challenged in a legal or administrative proceeding pending on or before April 1, 1999. Moreover, neither statute "constitute[s] a legislative declaration that the law to be applied in any such pending proceeding is different from or the same as set forth in this act." See Section 7 of ch. 15, Statutes of Nev. 1999, at 2364.

exercised and the current flow of the Truckee River into Pyramid Lake will be diminished. *See United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1221 (9th Cir. 1989) ("*Alpine II*"). The Tribe opposes Fernley's application because its economy, culture, and heritage are linked to the size of the flow of the Truckee River and to the health of Pyramid Lake.

The Tribe entered a timely opposition to Fernley's proposed transfer, and the United States joined the Tribe in opposition to the transfer. See 1990 Settlement Act, P.L. 101-618, 104 Stat. 3289 §§ 202, 209 (assigning Secretary of Interior the duty to protect the Tribe and the resources of Pyramid Lake); *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252, 256 (D.D.C. 1973), *rev'd on other grounds,* 499 F.2d 1095 (D.C. Cir. 1974). The Tribe and the government contend that the water rights that Fernley seeks to transfer no longer exist because the prior holders of those rights failed to exercise them for an extended period of time. In water law parlance, they contend that the water rights have been "forfeited" under Nevada statutory law, or have been "abandoned" under Nevada common law.

The initial decisions on the proposed transfers were made by the Nevada State Engineer pursuant to his authority under Nev. Rev. Stat. §§ 533.345 and 533.370, and *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 885 (D. Nev. 1980) ("*Alpine Decree*"), *aff'd as modified,* 697 F.2d 851, 857-58 (9th Cir. 1983) ("*Alpine I*"), *cert. denied,* 464 U.S. 863 (1983). The State Engineer approved the transfer of all but a few of the water rights at issue. He first entered factual findings that Fernley was the *bona fide* owner of the water rights and that the town had been paying the operation and maintenance fees for those rights. He then made a number of other legal and factual findings. We describe those that are relevant to this appeal.

First, the Engineer rejected the argument that some of the water rights at issue had been forfeited under Nev. Rev. Stat. § 533.060(2)

(1997).[3] The Tribe and the government had agreed that Nevada law protected from forfeiture water rights that had been "vested," or for which appropriations had been "initiated," before the passage of the forfeiture statute on March 22, 1913. *See* Nev. Rev. Stat. § 533.085. But they contended that some of the water rights at issue were subject to forfeiture because the rights had not vested, and appropriations had not been initiated, before March 22, 1913. The Engineer disagreed, concluding that under Nevada's "relation back" doctrine, appropriations of all of the rights at issue were "initiated" within the meaning of Nev. Rev. Stat. § 533.085 in July 1902, when the United States government initiated the Newlands Project. The Engineer therefore ruled that all of the water rights at issue were exempt from forfeiture under Nev. Rev. Stat. § 533.085.

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[3]3For ease of reference in this opinion, we will refer to the version of Nev. Rev. Stat. § 533.060(2) in effect before the 1999 amendments to that statute without specifically noting that we are referring to the pre-1999 version. The statute, as it existed before 1999, provides:

> Except as otherwise provided . . . if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

Second, the Engineer rejected arguments that non-forfeited water rights were abandoned under Nevada common law. He ruled that Nevada did not recognize a legal presumption in favor of abandonment upon a showing of prolonged non-use, and that in the absence of such a presumption the Tribe had produced "no evidence" to indicate that abandonment had occurred. The Tribe and the government appealed the Engineer's rulings to federal district court in Nevada, pursuant to the procedure approved by this court in *Alpine I. See* 697 F.2d at 857-58; *see also United States v. Orr Water Ditch Co.,* 914 F.2d 1302, 1308 (9th Cir. 1990). The district court affirmed and denied a later motion for reconsideration. The Tribe and the government appeal to this court. We reverse and remand.

II. Legal Background

Water litigation is a weed that flowers in the arid West. The federal courts first considered water rights issues in the Newlands Project in 1913, in a quiet-title action instituted by the United States. Over thirty years after that suit was initiated, a Nevada district court finally adjudicated water rights in the Truckee Division of the Project. See *United States v. Orr Water Ditch Co.,* In Equity, Docket No. A-3 (D. Nev. Sept. 4,1944) ("*Orr Ditch Decree*"). Thirty-six years after that, we adjudicated water rights in the Carson Division. *See Alpine Decree,* 503 F. Supp. at 877, *aff'd, Alpine I,* 697 F.2d at 851.

Of particular relevance to this case is a series of decisions involving water rights in the Carson Division. Following the *Alpine Decree* and our affirmance of that decree in *Alpine I,* many water right holders in the Carson Division sought to transfer water rights that were appurtenant to other Project land to their own land. As in this case, the Tribe opposed many of the transfer applications on the grounds that the rights had been forfeited or abandoned. When the State Engineer ruled that Nevada's statutory forfeiture provision did not apply to the water rights at issue and that there was no evidence of abandonment, the Tribe appealed.

Initially, a district court affirmed the Engineer on the ground that Nevada law did not apply at all, but in *Alpine II* we disagreed. We reversed and remanded to the district court for review of the Engineer's findings on forfeiture and abandonment based on state law. On remand, the district court affirmed the Engineer's findings. Once, again, the Tribe appealed to this court, and, in *United States v. Alpine Land & Reservoir Co.*, 965 F.2d 731 (9th Cir. 1992), *amended by United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993) ("Alpine III"), we once again reversed.

On the question of forfeiture, we held that the Engineer had erred in determining that, because of the exemption created in Nev. Rev. Stat. § 533.085. Nevada's forfeiture statute did not apply to the water rights in question. The Engineer had written, "The existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902." *Id.* at 1495. We disagreed, noting that "the individual rights at issue. . . did not vest in 1902 when the United States obtained Project-wide rights." *Id.* at 1496. We concluded that individual water rights were exempted from the Nevada forfeiture statute only if the rights were vested, or the appropriations had been initiated, prior to 1913:

> If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Id. We therefore remanded for an individualized determination, for each parcel at issue, of "whether and when the right vested, and under which law appropriation was initiated." *Id; see also United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230 (D. Nev. 1998) ("*Alpine IV*") (district court's opinion on remand).

On the question of abandonment, we held that the State Engineer had abused his discretion by failing to conduct an individualized inquiry to

determine whether each water right sought to be transferred had been abandoned by the transferor property owner. *Alpine III,* 983 F.2d at 1494. As of the time we write this opinion, the State Engineer has yet to make the findings required under *Alpine III.* Therefore, while our cases involving the Carson Division (in particular, *Alpine III*) set forth the legal rules for adjudicating questions of forfeiture and abandonment of water rights in the Newlands Project, this Truckee Division case presents the first time we have been asked to review the State Engineer's application of these rules.

III. The Law of Forfeiture and Abandonment

Water rights can be lost in Nevada either through forfeiture or abandonment. In most cases, it is easier to establish forfeiture than abandonment because forfeiture requires only a showing of non-use for five successive years. Abandonment, on the other hand, is the "relinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring,* 108 P.2d 311, 315 (Nev. 1940) (citation omitted). Abandonment therefore requires a showing of actual intent to abandon. Non-use can provide "some evidence" of intent, *see In re Franktown Creek,* 364 P.2d 1069, 1072 (Nev. 1961), but it is not by itself sufficient to establish abandonment. In the case now before us, the Tribe and the government argue that some of the water rights in question are subject to forfeiture. Fernley argues that none of the water rights are subject to forfeiture. The parties agree that all of the water rights are subject to abandonment.

A. Forfeiture

[1] Under Nevada law, a water right is forfeited if it is shown not to have been exercised for five successive years. *See* Nev. Rev. Stat. § 533.060. However, Nevada law specifies that the forfeiture statute does not apply to water rights that were vested or for which appropriations were initiated before that statute took effect, on March 22, 1913:

> Nothing contained in this chapter [establishing the

> statutory rule of forfeiture] shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Nev. Rev. Stat. § 533.085(1). If a water right is exempted from the Nevada forfeiture statute, it may be lost only through abandonment.

We considered the relationship between Nev. Rev. Stat. § 53 3.060 and § 533.085 in our decision in *Alpine III.* In that case, the State Engineer had determined that the forfeiture statute did not apply to the water rights at issue because "[t]he existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authonzed Lahontan Dam in 1902. 983 F.2d at 1495. The Engineer assigned all Newlands Project water rights a single vesting date for purposes of Nev. Rev. Stat. § 533.085 – the 1902 date on which Congress initiated the Newlands Project. We rejected this approach in *Alpine III* and instead held that a water right had to be vested, or that appropriation of that right had to have been initiated, for the particular parcel of land to which it was appurtenant for that nght to be exempt from forfeiture under § 53 3.085. *See* 983 F.2d at 1495-97.

Given the purpose of § 533.085, this was a sensible construction of the terms "vested" and "initiated" as used in that statute. The passage of the Nevada forfeiture statute in 1913 made water rights more precarious. Prior to its passage, water rights could be lost only through abandonment; now they could also be lost through forfeiture. To the extent that a water right could be lost more easily after the passage of the forfeiture statute, one "stick" in the "bundle of sticks" that had previously comprised that water right had been taken away.

For water-right holders whose rights had vested by 1913, or who had already initiated appropriations of their rights by that date, the new forfeiture statute could work unfairly because these holders had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than Just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property. The Nevada legislature alleviated concerns about unfairness and unconstitutionality by exempting both categories of holders from forfeiture under § 53 3.060. If a holder either possessed a vested water right on March 13, 1913, or had initiated appropriation of a water right by that date, the right-holder was protected from forfeiture by § 533.085. In the jargon of modern takings law, if a water right holder had an investment-backed expectation as of the effective date of the statute, that holder's water right was exempt from forfeiture.

Given the purpose of § 533.085, it does not make sense to read the term "initiated" to refer to 1902, the date the United States initiated the water rights for the entire Newlands Project. Such a reading would protect water-right holders who had done nothing at all to acquire water rights as of the date of the forfeiture statute. There was reason to protect individuals whose investment-backed expectations would be violated by § 533.060, and § 533.085 did so by exempting their rights from forfeiture. But there was no reason to protect individuals who began the process of acquiring water rights after the effective date of the statute, because they did so with notice that any water rights they acquired .would be subject to forfeiture.

As we explained in *Alpine III,*

> According to the Nevada Supreme Court, the Nevada legislature included the provision exempting pre-1913 nghts from impairment to refrain from infringing upon rights which had accrued at that time, so as to avoid any

question of the constitutionality of the Act." *Manse Spring,* 108 P.2d at 315.

* * *

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, *with the purpose of the statute in mind,* it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

* * *

If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

Alpine III,, 983 F.2d at 1496 (emphasis added).

[2] We held in *Alpine III* that in order for a given water right to receive the protection of Nev. Rev. Stat. § 533.085, that water right must have vested, or an individual landowner must have "initiated" appropriation of that right, before March 22, 1913. In other words, the

landowner must have taken affirmative steps to appropriate water for his or her own use by that date. In practice, this means that the individual must have (at the very least) contracted with the federal government prior to that date for delivery of Project water. Accordingly, we hold that the State Engineer erred in concluding that, for purposes of § 533.085, all water rights in the Truckee Division were "initiated" when land for the Newlands Project was withdrawn from public entry by the federal government in 1902. We further hold that the district court made the same error when, in affirming the Engineer, it concluded that because each individual Project water right has a "priority date" of July 2, 1902, it was therefore initiated, within the meaning of § 533.085, on that same date.

We agree with the Engineer and the district court that the priority date for all of the rights at issue in this case is 1902. The Orr Ditch Decree, affirmed by the Supreme Court, established this priority date. See *Nevada v. United States,* 463 U.S. at 117. But our holding in *Alpine III* did not concern a priority date. Rather, it concerned the forfeiture exemption provided by § 533.085.

In *Alpine III,* we remanded the case for a determination of vesting and initiation dates for particular parcels. The district court to which we remanded in *Alpine III* understood our holding in the same way we understand it today, writing that *Alpine III* "drew a distinction between the rights obtained by the United States and the rights appurtenant to particular tracts of land" for purposes of Nev. Rev. Stat. § 533.085. *Alpine IV,* 27 F. Supp. 2d at 1240. The district court accordingly directed the Engineer to determine "when the individual landowner took the 'first steps' to appropriate the water appurtenant to his land, and not [to] rely on the 1902 priority date." *Id.* at 1241. Failure to do so, the district court observed, would be an abuse of discretion. *See id.*

Our reading of *Alpine III* is reinforced by the history of that decision. After a petition for rehearing, the *Alpine III* panel modified its opinion. The original language of the *Alpine III* remand order appears at

965 F.2d 739:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether when [sic] the right vested. Only if the right vested after March 22, 1913 would it be subject to possible forfeiture under NRS 533.060.

This language caused some concern to the appellees in that case, the State Engineer and the Truckee-Carson Irrigation District ("TCID"). They pointed out that Nev. Rev. Stat. § 533.085 protects not only the "vested right of any person to the use of water" but also "the right of any person to take and use water . . . where appropriations have been *initiated* in accordance with law prior to March 22, 1913." Nev. Rev. Stat. 533.085 (emphasis added). TCID argued in its brief that "[t]he Court's focus on the vesting date of these water rights ignores the fact that the same protection afforded vested water rights was also extended to non-vested water rights in the Nevada Water Law of 1913." It then stated that there was "no question" that the water rights at issue were "initiated" prior to 1913. The State Engineer's brief argued that *Alpine III* had ignored the principle of "relation back" by separating "vesting date" from "priority date," and had erred in distinguishing the water rights acquired by the federal government from the Project farmers' water rights. Once the farmers received their land patents, the Engineer argued, "the Project farmers acquired the Government's interest in the water rights, and once the water was put to beneficial use, these rights dated back to 1902."

In response to the petition for rehearing, the *Alpine III* panel modified its opinion so that the final paragraph of Section IV now reads:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether <u>and</u> when the right vested, <u>and under which law appropriation was initiated</u>. <u>If</u> the right vested <u>before</u>

March 22, 1913 or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.[4]

The panel thus rejected the argument that all appropriations were initiated in 1902, and remanded for individual determinations.

B. Abandonment

[3] In addition to claiming that some of the water rights at issue in this case have been forfeited under Nevada statutory law, the Tribe also claims that some of them have been abandoned under Nevada common law. Under Nevada law, abandonment is "the relinquishment of the right by the owner with the intention to forsake and desert it." *Manse Spring,* 108 P.2d at 315. Abandonment thus requires a showing of subjective intent on the part of the holder of a water right to give up that right.

Subjective intent is difficult to prove by direct evidence. Few water-right holders say in front of witnesses, "I intend to abandon my water rights." Therefore, indirect and circumstantial evidence must almost always be used to show abandonment. Many states have adopted legal presumptions designed to ease the burden upon the challenger and to increase the likelihood that water will be put to beneficial use. In particular, nearly all western states presume an intent to abandon upon a showing of a prolonged period of non-use. *See, e.g., Okanogan Wilderness League, Inc., v. Town of Twisp,* 947 P.2d 732, 739 (Wash. 1997); *In re Clark Fork Drainage Area,* 908 P.2d 1353, 1356 (Mont. 1995); *Consolidated Home Supply Ditch and Reservoir Co. v. Town of Berthoud,* 896 P.2d 260, 266 (Cob. 1995); *State ex rel. Reynolds v. South Springs Co.,* 452 P.2d 478, 482-83 (N.M. 1969); *Yentzer v.*

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[4]The underlined portions of the paragraph were added or altered in the amended version of *Alpine III.*

Hemenway, 440 P.2d 7,13 (Wyo. 1968); *Utt v. Frey,* 39 P. 807, 809 (Cal. 1895).

The State Engineer ruled in this case, however, that Nevada does not include such a presumption in its common law of abandonment, and that the Tribe could not therefore shift the burden of proof to require Fernley to show affirmatively that there was no intent to abandon merely by showing a prolonged period of non-use. The district court agreed. While we consider the State Engineer's interpretations of Nevada statutes "persuasive," they are not controlling. We review the district court's conclusions of law *de novo. See Alpine II,* 878 F.2d at 1222; *Town of Eureka v. State Engineer,* 826 P.2d 948, 949 (Nev. 1992). On *de novo* review, we agree with the district court.

[4] Under Nevada case law, a prolonged period of non-use may be taken into consideration in determining whether a water right has been abandoned, *see Manse Spring,* 108 P.2d at 316, and non-use "may inferentially be some evidence of an intent to abandon." *Franktown Creek,* 364 P.2d at 1072. But Nevada law goes no further than an inference. It is only a matter of degree, but a legal presumption is stronger than an inference. None of the cases cited by Fernley explicitly disclaims a presumption, but neither the Tribe nor the government cites any Nevada decision showing that Nevada law has changed since our decision in *Alpine III,* where we stated "[t]hough the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable presumption under Nevada law." 983 F.2d at 1494 n.8; *see also Alpine IV,* 27 F. Supp. 2d at 1242. We acknowledge that Nevada appears to be the only western state that maintains this position, but in our federal system it is entitled to do so.[5]

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[5]Nevada has recently reaffirmed its commitment to a limited view of the law of abandonment. As amended in 1999, Nev. Rev. Stat. § 533.060(4) now states (emphasis added):

[5] On appeal to this court, the Tribe asserts that the State Engineer was wrong to consider payment of operation and maintenance fees as sufficient evidence to support a finding that the particular water rights had not been abandoned. According to the Nevada Supreme Court, abandonment is to be determined "from all the surrounding circumstances," and those circumstances certainly include the payment of assessments and taxes. *Revert v. Ray,* 603 P.2d 262, 264 (Nev. 1979); *see also Alpine IV,* 27 F. Supp. 2d at 1243. But payment of fees is not the only factor to be considered when there is conflicting evidence on the issue of abandonment. Other important circumstances to be considered include non-use of the water right, *see Franktown Creek,* 364 P.2d at 1072; *Manse Spring,* 108 P.2d at 316, and the construction of structures incompatible with irrigation. See Nev. Rev. Stat. § 533.045 ("When the necessity for the use of water does not exist, the right to divert it ceases, and no person shall be permitted to divert or use the waters of this state except at such times as the water is required for a beneficial purpose."). In order to guide the

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> In a determination of whether a right to use surface water has been abandoned, a presumption that the right to use the surface water has *not* been abandoned is created upon the submission of records, photographs, receipts, contracts, affidavits or any other proof of the occurrence of any of the following events or actions within a 10-year period immediately preceding any claim that the right to use the water has been abandoned: (a) The delivery of water; (b) The payment of any costs of maintenance and other operational costs incurred in delivering the water; (c) The payment of any costs for capital improvements, including works of diversion and irrigation; or (d) The actual performance of maintenance related to the delivery of the water.

district court and the State Engineer in this and other abandonment proceedings, we endorse the district court's statement in *Alpine IV:*

> Where there is evidence of both a substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.

27 F. Supp. 2d at 1245.

IV. Application of the Law of Forfeiture and Abandonment

A. Forfeiture

As explained above, the State Engineer ruled that, for purposes of Nev. Rev. Stat. § 533.085, the water rights at issue all have an initiation date of 1902. He therefore found that none of the water rights is subject to forfeiture under § 533.060. The Engineer also made alternate findings based on the assumption that the water rights were not initiated in 1902 and were therefore subject to forfeiture.

In his alternative findings, the Engineer assumed that the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19, and 20 were not protected from forfeiture. Accordingly, the Engineer examined evidence introduced by the Tribe to determine if any of these eight water rights were not exercised during "any 5 successive years." Nev. Rev. Stat. § 533.060. The Engineer evaluated the evidence presented for these parcels and concluded that only one of the appurtenant water rights had been forfeited. As to the others, he found that the Tribe had failed to prove the statutory period of non-use "by clear and convincing evidence." *Town of Eureka,*

826 P.2d at 952.

The district court did not review the Engineer's alternative findings with respect to forfeiture because it agreed with the Engineer that the only applicable legal theory was abandonment. We are reluctant to review the Engineer's findings without allowing the district court to do so first. Even if we were willing to conduct such a review, however, we could not do so on the record before us. While the record includes the Engineer' s ruling, it does not contain the evidence introduced in the proceeding before the Engineer. We therefore remand to the district court. On remand, the district court will have the opportunity to review the Engineer's forfeiture findings on a parcel-by-parcel basis, and to incorporate into the district court record the evidence submitted to the Engineer relevant to those findings.

Despite the limitations imposed by the current state of the record, it may be appropriate for us to comment on what we do have before us. We are concerned that the Engineer may have misunderstood the "clear and convincing evidence" standard necessary to establish forfeiture. For example, we note his ruling that the Tribe failed to prove by clear and convincing evidence that the water rights appurtenant to Parcel 1 have been forfeited. The Engineer acknowledged that the Tribe introduced evidence that the parcel had been described as "bare land, prepared for cultivation" (based on interpretations of aerial photographs) in 1949, 1973, and 1977; simply as "bare land" (based on an infrared aerial photograph) in 1984; and as "bare land, buildings, and roads" in 1991. Another aerial photograph taken in 1993 showed no evidence of irrigation. Testimonial evidence indicated that the farm located on Parcel 1 was "in disrepair" and was "not organized or prepared for cultivation." The Tribe also introduced a map, prepared by the Bureau of Reclamation, which showed that Parcel 1 had not been irrigated in any of the years between 1984 and 1989.

The Engineer's ruling does not refer to any contrary evidence, yet he concluded that the Tribe had failed to establish by clear and convincing

evidence that the water rights appurtenant to Parcel 1 had been forfeited. In support of his conclusion, he wrote that there was no evidence of non-use in the years between the aerial photographs, that the Bureau map could be unreliable, that the aerial photographs may have been wrongly interpreted, and that the on-the-ground surveys were not performed frequently enough. In so concluding, the Engineer does not appear to have required only clear and convincing evidence. *See Albert H. Wohlers & Co. v. Bartgis,* 969 P.2d 949, 957 n.4 (Nev. 1999) (approving jury instruction describing clear and convincing evidence as "evidence which is beyond a mere preponderance of the evidence"); *accord Topaz Mutual Co., Inc. v. Marsh,* 839 P.2d 606, 609 (Nev. 1992). He appears to have demanded proof beyond a reasonable doubt, and perhaps even more than that. Our review of the Engineer's forfeiture rulings on other parcels suggests that his evaluation of the Tribe's evidence with respect to those parcels may also have gone beyond a requirement of clear and convincing evidence.

B. Abandonment

The Tribe argued before the Engineer that some of the water rights in question were abandoned under Nevada common law. As we have noted above, the Engineer ruled correctly that Nevada law does not include a legal presumption in favor of abandonment based on a showing of prolonged non-use. He then stated, with respect to water rights subject to abandonment:

> Permanent improvements, such as farm buildings, roads and canals, have been constructed on some of the parcels. The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. However, the Tribe presented no evidence or testimony relating to the intent to abandon these water rights.

The Engineer noted that the Town of Fernley had "kept the rights in good

standing" by paying the applicable fees for water delivery, and that "no evidence in the record indicat[es] that any previous owner failed to pay the assessments or in any way displayed an intent to abandon or forsake these water rights." He then found that none of the water rights in question had been abandoned.

In appealing the Engineer's findings, the Tribe and the federal government argued that he failed to consider evidence of abandonment they had introduced. In particular, they argued that evidence of prolonged non-irrigation combined with evidence of improvements inconsistent with irrigation needs (for example, buildings) were sufficient to show that water rights appurtenant to a given parcel of land had been abandoned. The district court rejected their arguments, but did not review the evidence on a parcel-by-parcel basis in its order, stating only that the Engineer "did not ignore the Tribe's evidence."

The State Engineer's findings concerning abandonment are reviewed in federal court to determine whether they are supported by "substantial evidence." *See Revert v. Ray,* 603 P.2d at 264. We cannot determine from its order whether the district court reviewed the Engineer' s findings for conformity with Nevada abandonment law, as articulated by Nevada statutes and case law and by the district court in *Alpine IV.* We are also unable to review those findings because the evidence introduced in the proceeding before the Engineer has not been incorporated into the district court record that is now before us. We therefore remand for further proceedings. On remand the district court will have the opportunity to review, on a parcel-by-parcel basis, the evidence before the Engineer to determine whether it supports his findings on abandonment, and to include in the record the relevant evidence presented to the Engineer.

As with his forfeiture findings, we think it may be appropriate to comment briefly on the Engineer's abandonment findings. From his written findings, it appears that the Engineer may have misapplied Nevada's clear and convincing evidence standard in finding no abandonment, just as he

appears to have done in finding no forfeiture. For example, the Tribe and federal government introduced a substantial amount of circumstantial evidence showing that the water rights appurtenant to Parcel 10 had been abandoned. This evidence included aerial photographs taken in 1949, 1973 and 1977 showing that Parcel 10 was "bare land"; descriptions of the land in 1984 and 1991 indicating that it was not being used for agriculture; and a photograph taken in 1993 showing that the land had been converted to a residential subdivision. The Engineer nevertheless ruled that there was no "clear and convincing evidence" that the water rights appurtenant to Parcel 10 had been abandoned, even though there was no contrary evidence to show that those rights had ever been exercised. As with the Engineer's findings with respect to forfeiture, these findings appear to rest on a standard of proof higher than "clear and convincing evidence."

Conclusion

We reverse the decision of the district court and remand for further proceedings consistent with this opinion.

NOONAN, Circuit Judge, dissenting:

In 1902, the United States initiated the appropriation of the water rights here in dispute by the enactment of the Reclamation Act. *See Nevada v. United States,* 463 U.S. 110, 115-117 (1983). In so doing, the United States acted as trustee on behalf of the later individual owners of land within the Reclamation Project. *Id.* at 126. These water rights were consequently not subject to forfeiture and can now be transferred as the State Engineer and the district court ruled. In reaching the result it does, the majority silently but effectively departs from what the Supreme Court of the Umted States has already determined.

There cannot be any argument that when the United States began the Newlands Reclamation Project in 1902, it initiated the appropriation of the relevant water rights. Nothing prior to the enactment of the 1902 statute initiated the appropriation. Anything after 1902 merely carried out what had begun in 1902. This year was accordingly the priority date for

ownership of the water rights, and the Reclamation Act was the first step in establishing beneficial ownership of the water for the individual landowners. Their rights relate back "to the time when the first step was taken to secure [them]." *Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-44 (1869). The water rights are not forfeitable "where the appropriations of the right have been initiated in accordance with law prior to March 22, 1913." Nev. Rev. Stat. § 533.085.

Why is it that the majority does not reach this conclusion? First, because it misinterprets *Alpine III*. That case was about vesting; this court reversed the State Engineers's erroneous determination that water rights had vested in 1902. *Alpine III,* 965 F.2d 731, 738 (9th Cir. 1992). When it was brought to the court's attention that the court had said nothing about the initiation of appropriation of rights (an issue not before it), the court amended its disposition to remand the question of initiation. *Alpine III, as amended,* 983 F.2d 1487, 1496 (9th Cir. 1993).

The majority engages in the speculation that the purpose of the Nevada anti-forfeiture statute was to exempt "investment-backed expectations." Nothing in the language of the statute evinces this purpose. Where initiation of appropriation is begun there is no investment. There is merely an assertion of title. As the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investment.

The majority admits that in 1902 "the United States initiated the water rights for the entire Newlands Project." The majority's second error is implicitly to suppose that the Nevada legislature used "initiation of appropriation" to mean something different from the first step in the process of acquiring a water right. It makes perfect sense for the Nevada legislation to protect the Nevada individuals for whom the United States acted. It makes no sense to suppose with the majority that initiation of appropriation means one thing for purposes of priority and a very different thing for purposes of protection from forfeiture under § 533.085.

I concur with the court in its ruling on abandonment. I believe that its ruling on forfeiture misinterprets *Alpine III*, Nevada law, and what is at least implicit in *Nevada v. United States, supra.*

U.S. DISTRICT COURT DISTRICT OF NEVADA ENTERED & SERVED MAY 14, 1999

CLERK, U.S. DISTRICT COURT, BY S/_____

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OFAMERICA,

Plaintiff,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

V.

ORR WATER DITCH DO., et a!.,

Defendants.

Matter of Nevada State Engineer Ruling No. 4116, re: Application 56226

Case No. (Equity) A-3-LDG

ORDER

The Pyramid Lake Paiute Tribe of Indians (the Tribe) and the United States of America (collectively the Appellants) each appeal the Nevada State Engineer's Ruling No. 411 6 (#62, #63). The State Engineer, the Town of Fernley, and the Truckee-Carson Irrigation District (Irrigation District) have filed oppositions, and the United States and the Tribe have replied.

Brief Factual Background

On July 2,1902, the United States commenced the Newlands Reclamation Project, withdrawing over 200,000 acres of land in the vicinity of Fallon, Nevada. With due diligence,the United States thereafter commenced and proceeded with the construction of the related irrigation

works necessary to irrigate this land. Initially, and pursuant to the Reclamation Act, Project water was intended to be used primarily for irrigation, but could also be used for watering livestock and for domestic purposes. In 1990, Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, Public Law 101-618 §200 eta!., (the Settlement Act). Section 209(a) of the Settlement Act expressly permitted Project water to be used for municipal purposes.

Fernley purchased water rights to about 280 acre-feet of Project water from various landowners and applied to the State Engineer to change the manner and place of use of these newly purchased water rights from irrigation to municipal use. The United States and the Tribe protested Fernley's application. Following briefing, a hearing, and post-hearing briefs, the State Engineer approved Fernley's application. The parties have briefed this matter and the matter is now before the Court.

Issues on Appeal

Stated succinctly, the Appellants raise the following issues on appeal.

1. Whether the State Engineer erred in failing to recuse himself?

2. Whether the State Engineer erred in not requiring approval of the Secretary of the

Interior as a prerequisite to any approval by the State Engineer?

3. Whether the Secretary of the Interior allocated water rights to each of the existing places of use identified on Fernley's Application?

4. Whether the State Engineer erred in finding that the water rights purchased by Fernley are currently valid? Stated otherwise, did the State Engineer err in finding that the subject water rights had been perfected, were not abandoned and were not subject to forfeiture?[1]

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[1]In its moving papers, the United States also raised an issue whether the State Engineer erred by allowing the

In considering these issues, the Court presumes that the State Engineer's factual findings are correct, with the burden to show otherwise resting upon the party attacking the State Engineer's ruling. N.R.S. § 533.450(9). This Court reviews whether the findings are supportedby substantial evidence and determines whether the State Engineer's findings are an abuse of discretion. *Town of Eureka v. State Engineer,* 108 Nev. 163, 165 (1992). This Court does not weigh the evidence or substitute its opinion for that of the State Engineer. The State Engineer's interpretation of law is reviewed de novo. *Id.*

Recusal of State Engineer

Both Fernley and the State Engineer argue that the Tribe cannot raise this issue on appeal because it failed to properly raise this issue below. The Tribe counters that it properly raised this argument to the State Engineer at a pre-hearing status conference, but that the State Engineer failed to address the issue in his ruling.

A review of the transcript of the pre-hearing status conference indicates that the Tribe stated that it was raising its "standing motion" to disqualify the State Engineer. In response, the Hearing Officer stated that the motion should be raised at the hearing, not the status conference. The Hearing Officer further noted that the Tribe intended to move to recuse the State Engineer at the hearing and that he would consider a motion to recuse made during the hearing. However, the Tribe did not follow through on its intention; it did not move to recuse the State Engineer during the hearing. Accordingly, the Tribe waived its right to argue that the State Engineer should have recused himself by failing to properly raise the motion during the hearing below.

Approval of the Secretary of the Interior

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transfer of the full water duty of 4.5 acre-feet per acre. At oral arguments, however, the United States formally withdrew this issue.

The United States argues that the approval of the Secretary of the Interior is a prerequisite to the State Engineer's approval of the proposed transfer and change of use of the Project water rights at issue. In his ruling, the State Engineer stated only that, prior to changing the manner and place of use of the water, Fernley must comply with applicable federal law.

The United States offers two theories in support of its argument. First, the Government asserts that its approval is required because it is the "legal owner" of the water rights. Second, the Government suggests that §209 of the Settlement Act requires that Fernley obtain the Secretary's approval of the proposed change before seeking the State Engineer's approval.

In response, Fernley, the Irrigation District, and the State Engineer suggest that the United States does not have any ownership interest in the water rights. Alternatively, if the United States does have an ownership interest, such interest is "at most minimal" and does not include a right to prohibit the beneficial and equitable owner of the water right from changing the place and manner of use pursuant to state law. These parties also point out that the United States has failed to identify any statute or other provision of law that either expressly requires the approval of the Secretary or requires that approval prior to the State Engineer's approval of the transfer application.

The United States' argument fails for several reasons. First, the United States' ownership rights in the water rights at issue are "at most minimal." *Nevada v. United States,* 463 U.S. 110, 126 (1983). These "minimal" ownership rights do not provide the United States the right to require the beneficial and equitable owner of a water right seeking to transfer the water right to obtain the approval of the United State prior to seeking the approval of the State Engineer. Second, the State Engineer did not rule that it was not necessary for Fernley to obtain approval from the United States. Rather, he ruled that Fernley was required to comply with all federal law regarding the proposed transfers.

Third, §209 of the Settlement Act fails to provide support for the United States' position. Nothing in the language of §209 expressly requires that a beneficial owner of a water right first obtain the approval of the Secretary before submitting a transfer application to the State Engineer. Rather, §209 more appropriately appears to be an expression by Congress that the United States has consented and approved beneficial owners of Newlands Project water rights changing the manner of use of their water right from irrigation to municipal uses. Finally, the Court notes that the United States has not indicated the procedure by which an owner of a Project water right is to obtain the consent of the United States prior to seeking the State Engineer's approval to transfer the place of use. In total, the Court finds that the State Engineer did not err in ruling that Fernley was required to comply with all applicable federal law prior to actually changing the manner and place of use of the water rights at issue.

Allocation of Water Rights to the Places of Use Identified in Fernley's Transfer Application.

The United States argues that Fernley failed to establish that the specific water rights they purchased were appurtenant to specific Project land. Although the Government generally raises this issue as to Parcels 1 - 5, 7 - 1 2, and 1 5 - 28, its arguments are premised only upon the water rights deed related for Parcel 16. As such, the Court will consider the United States' argument only as to Parcel 16.

The Government's argument is not based upon evidence admitted at the hearing before the State Engineer. While a witness testified at the hearing that the water right deed for Parcel 16 identified the specific land to which rights were appurtenant, none of the parties offered the deed itself as evidence. Rather, only after the hearing did the United States first examine the water rights deed for Parcel 16. As a result of this belated examination, the United States concluded that the deed does not specifically identify the appurtenant land. Given that the United States failed to argue or present any evidence on this issue to the State Engineer,

the Court cannot find error in the State Engineer's ruling.

Current Validity of the Water Rights

State Engineer's Conclusion that Nevada's Forfeiture Statute Does Not Apply

The threshold question before the Court is whether the State Engineer correctly found that each of the individual water rights vested on July 2, 1902. Having carefully reviewed the entire record, and the history of the Orr Ditch litigation, the Court finds that the State Engineer did not err. In the Orr Ditch Final Decree, the court awarded a July 2, 1 902, priority date for all individual water rights within the Newlands Project governed by the Decree. Accordingly, as the July 2, 1 902, priority date is the law of the case, the State Engineer could not err when he applied this priority date in considering these change-of-use applications. Further, this conclusion is consistent with the Supreme Court's decision in *Nevada v. United States,* 463 U.S. 110 (1 983), in which the Court determined that all water rights for the Truckee were adjudicated by the Orr Ditch Final Decree. Finally, finding that each individual Project water right has a July 2, 1 902, priority date is consistent with water law in general, and with Nevada water law in particular.

Proper resolution of the issue whether the State Engineer erred requires recognition that the priority of water rights, including Project water rights, was a core issue in the Orr Ditch litigation from the filing of the original complaint. The United States initiated the litigation in 1913, "as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the water of the Truckee. and required all parties to fully set up their respective claims." *Nevada,* 463 U.S. at 120. The United States expressly alleged that it sought a judicial resolution of the priority of water rights for the Truckee River. As stated by the Government in its amended complaint,

> Until the several rights of the various claimants, parties hereto, including the United States, to the use of the

> waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be protected would necessitate a multiplicity of suits.

Amended Complaint (emphasis added). Further, as noted by the Supreme Court, "the primary purpose of the Government in bringing the Orr Ditch suit in 1913 was to secure water rights for the irrigation of land that would be contained in the Newlands Project. ..." *Nevada,* 463 U.S. at 121.

The United States, in essence, asked the court in 1913 to place every user of Truckee River water in a line and, when placing those users in the line, to place them in the order that they were allowed to take water.[2] The benefits of creating such a line are obvious. First, those persons standing in line will be limited to only those users who have already obtained, or who are in the process of obtaining, a right to take water. All other persons wanting to take water, but who had not yet commenced the process of obtaining a right to take water, would have to go to the end of the line when they started the process of appropriating water. Second, the water users placed at the front of the line would be secure in the knowledge that they would get water from the river in even the driest of years. In contrast, although users placed at the back of the line would have

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[2]The Court recognizes that stream adjudications are more complex than this simple model, involving other issues such as the place of diversion and the nature and manner of use. However, for present purposes this model is sufficient to serve as a conceptual aid in resolving the issue of the priority of the individual Project water rights.

less assurance of receiving water in dry years, these lower priority users could plan accordingly. In short, the creation of the line allows all users of the river water to rely on the line, and their relative placement in line, to plan their individual activities. Third, and as a result of the above, each water right gains a relative value according to a user's place in line. For example, persons that did not have a place in line, but who wanted to purchase a spot in line, would know that a water right at the front of the line would be more valuable than a water right at the back of the line. Similarly, those at the front of the line would know that their rights would be sought after by persons wanting to obtain water rights.

Each of these factors is revealed in the United States' complaint initiating the stream adjudication. First, the United States sought to secure spots in the line on behalf of the Tribe and the Newlands Project that it had initiated in 1902. Second, the United States would obtain a spot for the Tribe near the front of the line, while it would obtain a spot on behalf of the Newlands Project only slightly further back. Both of these positions were sufficiently close to the front of the line, however, that the Tribe and the farmers in the Project would be assured of obtaining water every year. Finally, by gaining a favorable placement for water designated for the Newlands Project, the United States ensured the likelihood of success for the Project. Farmers buying land from the United States within the Project would also be purchasing the water right appurtenant to the land that would permit the farmers to stand near the front of the water line, a right essential to the successful farming of the land. (Indeed, given the arid conditions of the region, land is effectively useless for farming if the land lacks a water right.) Each of these benefits was realized when, in 1 940, the court entered the Orr Ditch Final Decree judicially recognizing and creating a line for Truckee River water, and finally determining each and every user's place in that line.

The value of judicially forming and recognizing a line for water, and the reliance of all water users on the judicial recognition of that line, is

sufficiently great that the Supreme Court has held that even those persons who were not standing in the line created by the Orr Ditch Final Decree nevertheless have standing to enforce the Decree. In *Nevada,* the Tribe filed a complaint seeking to obtain an additional place near the very front of the Orr Ditch water line for an implied-reservation-of-water to maintain the Pyramid Lake fishery. The Supreme Court held that the Tribe's complaint was precluded by. res judicata. Every place in the line, the Supreme Court noted, including a spot for the Tribe's implied-reservation-of-water right for fishing, was litigated in the Orr Ditch litigation. Further, the Supreme Court held that even post-Final Decree appropriators, those persons who did not take a place in the Orr Ditch line until after the line had been judicially recognized by the Decree, could enforce the Final Decree as against the Tribe. As a result, if the Tribe wished to divert additional water to maintain the fishery, it would have to go not merely to the end of the line as judicially recognized in the Final Decree, but would also have to stand in line after every post-Decree appropriator. Thus, by judicially creating and recognizing the line, every person standing in the line has the right to enforce the line and to stop non-righted water users from cutting into line.

In addition, every person standing in line can enforce the line by removing users who lose their right to use water from the line. Indeed, the effort to remove users from the Truckee water line is at the heart of the present review. In recent years, including the present matter, the United States and the Tribe have engaged in an effort to remove from the water line every user who has allegedly lost his right to stand in line. With each user removed from the line, the line becomes shorter and the possibility of obtaining water by users standing at the end of the line is increased. Presumably, after *Nevada,* the Tribe has placed itself, or is seeking to place itself, as one of the those users at the end of the line waiting for Truckee River water.

One method of removing a user from a water line is to show that

the user has lost his spot in the line by forfeit. A water right, that is, a spot in the water line, is forfeited when the owner of that right fails to exercise his right to take water for five consecutive years, regardless of whether the owner intended to give up his spot in line to take water. Under Nevada law, however, only those spots in line after the critical date of March 22, 1913, are subject to forfeiture. *In Re Waters of Manse Springs,* 60 Nev. 280, 290, 108 P.2d 311 (1940). Any spot in line prior to March 22, 1913, is subject only to abandonment. Unlike forfeiture, to remove a user from the water line for abandonment requires showing not only that the user has not taken water, but that the user intended to abandon his spot in line. Thus, given the less-onerous and burdensome nature of showing forfeiture, the Tribe and the United States would prefer to attempt to remove users for forfeiture. Nevertheless, the Tribe and the United States can seek to apply forfeiture to a user only if that user's place in line is behind March 13, 1913, and therefore subject to forfeiture.

The preference to remove users by forfeiture explains the Tribe's and the United States' argument that the State Engineer erred when he found that every individual Project landowner has a priority of July 2, 1902. In terms of the analogy to the water line, the State Engineer concluded that each farmer was standing in line on the July 2,1902, spot that the United States obtained on behalf of the farmers for the specific and express purpose of irrigating the Project farm lands. The State Engineer's finding effectively precludes the Tribe and the United States from removing any Project landowner under the forfeiture standard. In this review, the Tribe and the United States assert that the State Engineer should have placed the individual farmers onto the spot corresponding with the date they took their first step to obtain a water right-to obtain a spot in the line-from the United States. The appellants expect that, when the individual users are placed in line according to the date they first sought a water right from the United States, many of the farmers will be placed behind the critical March 22, 1913, spot.

The argument that the State Engineer erred in placing the individual Project landowners on the July 2, 1902, spot, however, assumes that the farmers were not already standing on that spot pursuant to the Orr Ditch Final Decree. The assumption does not withstand scrutiny. Admittedly, the Final Decree does not expressly identify any Project farmer or landowner by name, or expressly assign a specific water right or priority date to any individual Project landowner. Neither does the Final Decree refer to individual Project water rights. Although the farmers are not expressly named or otherwise identified in the Orr Ditch Final Decree, each farmer has obtained a right to stand in line from the United States. In effect, the United States transferred to each landowner a portion of the right to stand in the Orr Ditch water line that the court awarded to the United States. In turn, as relevant tothe Newlands Project, the United States obtained its right to stand in line pursuant to Claim No. 3. As awarded in the Orr Ditch Final Decree,

> Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1 866, the [United States] is entitled and allowed to divert, with a priority of July 2, 1 902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project....

Orr Difch Final Decree, at 12. This language is clear, the United States was given a July 2, 1902, spot in line to divert water at the rate of 1500 cubic feef per second for the irrigation of Project lands.[3] The United States then transferred, (and had already transferred), portions of its July 2,

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[3]The award in Claim No. 3 also recognized other beneficial uses to which the diverted water could be applied. None of these other uses, however, is relevant to the present discussion.

1902, spot in line to individual Project farmers so that they could actually receive water and irrigate the Project lands, as required by the award. Thus, as each individual landowner claims his right to stand in line pursuant to the award of that right in Claim No. 3, each landowner benefits from the awarded priority date of July 2, 1902.

The language of the Final Decree provides further evidence that each Project landowner is already standing on the July 2, 1902, spot in the Orr Ditch water line. The water rights awarded in Claim No. 3 are expressly "for the irrigation of 232,800 acres of lands on the Newlands Project," and other beneficial uses. As Congress recognized in the Reclamation Act, "beneficial use shall be the basis, the measure, and the limit of the right" to use water acquired under the Act, including the Newlands Project. Just as beneficial use is the measure of the extent of a water right, a user can stand in line and divert water only if the water diverted will be placed to beneficial use. This concept is not surprising. Water that is diverted but not placed to a beneficial use is wasted, precluding its beneficial use by another user standing farther back in line who would not otherwise receive water. Only those persons that beneficially use water have the right to stand in line. In this case, the beneficial users of Project water are the Project landowners, not the United States; the Project landowners apply the water that is diverted to irrigate Project land. Absent the Project landowners and otherapproved users of Project water, the water diverted pursuant to Claim No. 3 would be wasted. Thus, in contrast to the United States' "at most minimal" right to the July 2, 1 902, spot in line, the Project landowners clearly stand on that spot as the beneficial users and owners of the water rights, allowing them to receive the water that the Orr Ditch Final Decree designated for the irrigation of Project lands.

Finally, and perhaps most significantly, both the United States and the Tribe are expressly enjoined by the Orr Ditch Final Decree from asserting that the individual Project landowners have a priority date other

than July 2, 1 902. As recognized by this Court in the Orr Ditch Final Decree, the Decree binds not only the original parties to Orr Ditch litigation,but also binds any and all persons claiming a water right adjudicated by the Final Decree.

> That the parties, persons, corporations, interveners, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and *each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or irs tributaries, or the waters of any of the creeks or streams or other waters hereinbe fore mentioned except the rights specified, determined and allowed by this decree..."*

Orr Ditch Final Decree, at 10 (emphasis added). The Supreme Court has specificallyrecognized that the Decree is binding upon not only the United States, but also the Tribe andthe Project landowners. "We hold that under the circumstances described above, the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the Orr Ditch suit." Nevada, 463 U.S. at 143. In this case, all parties, including the Tribe and the United States, are enjoined from asserting that the water rights being exercised pursuant to Claim No. 3 have a priority other than July 2, 1 902. Indeed, even the Project landowners are enjoined from asserting that the priority date for their water rights is other than July 2, 1 902. Stated simply, the Final Decree enjoins all users of Truckee water from disputing or arguing that those persons who take water pursuant to Claim No. 3, which includes the individual Project landowners whose rights are at issue in this matter, are

not standing on the July 2, 1902, spot in line. Thus, the Court finds that the State Engineer did not err in finding that each individual Project water right has a priority of July 2, 1902.

Nevertheless, the Court is cognizant of the several arguments that have been raised suggesting that the priority date for individual Project water rights has not been determined. One such argument is that the priority date for individual Project water rights should be measured from the date that the individual Project farmers took the first steps to obtain water from the United States. In essence, the argument is made that Project landowners taking irrigation water pursuant to Claim No. 3 should not be placed on the July 2, 1902, spot that the United States obtained for the purpose of irrigating Project land, but should be placed elsewhere in line.

The United States initiated both the Orr Ditch litigation and the Alpine litigation for the express and specific purpose of securing a priority date, a spot in line, that it would be transferring to individual farmers. As has been discussed above, the Orr Ditch Final Decree granted the relief sought by the United States, awarding a July 2, 1902, priority date for the irrigation rights within the Newlands Project, which award is binding upon all users of Truckee River water, including the United States, the Tribe, and the individual farmers.

In the Alpine litigation, the court's placement of the individual Project landowners onto the July 2, 1 902, spot in line is even clearer. The court awarded the July 2, 1 902, priority date to the individual Project land owners as follows:

> The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. These rights have a priority of July 2, 1902. The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lien-holder's interest to secure

repayment of the project construction costs.

United States v. Alpine Land & Reservoir, 503 F.Supp. 877, 879 (D.Nev. 1980). That this holding was not challenged, and thus became final, is not surprising since the parties to the Alpine litigation agreed, before trial, that the priority date of the individual Project landowners' water rights was July 2, 1902. *Id.,* at 885. In effect, all parties, including the United States and the Tribe, agreed to resolve a core issue of the Alpine litigation, as alleged by the United States in its complaint, as to where the individual farmers were standing in the line for Carson River water.

The suggestion remains, however, that the Alpine Court's final judgment awarding the farmer's a July 2, 1 902, spot in line somehow did not resolve the issue of the farmer's proper place in line, because the parties settled rather than litigated this core issue. This Court is extremely concerned by the suggestion, as it calls into question the validity of every final judgment this Court has entered as a result of the parties settling, rather than litigating, claims alleged in the complaint. As in the Orr Ditch litigation, the United States initiated the Alpine litigation to finally resolve the dispute as to each Project farmer's place in line for Carson River water. The parties agreed to the July 2, 1902, priority date for the very purpose of resolving this claim.

The Court recognizes that the suggestion, (that the parties' settlement agreement did not resolve the issue of the farmer's proper place in line), arises from the fact that the agreed-upon priority date of July 2, 1902, was also material in resolving **another** of the United States' claims brought in the Alpine Complaint: each farmer's water duty, the amount of water to which each farmer was entitled. The United States argued that the water duty was governed by the 1903 Cooperative Act. The trial court noted, however, that the 1903 Cooperative Act did not apply because the water rights for individual farmers had priority dates of July 2, 1902, as stipulated by the parties before trial. If this stipulation is considered only

in the context of the United States' water-duty claim, (thereby ignoring the context of the overall litigation, including the United States' priority claim), then one can reach the erroneous conclusion that the parties agreed to the priority date solely for the purpose of resolving the applicability of the 1903 Cooperative Act to the amount-of-water dispute. In turn, this leads to the incorrect suggestion that the Project landowner's place in line was not resolved by the Alpine Final Decree.

Nothing in the record of the Alpine litigation indicates that, in agreeing upon a priority date, the parties did not intend to actually resolve the core issue of the landowner's priority. Similarly, the record of the Alpine litigation lacks any suggestion that the sole purpose in reaching this agreement was to resolve whether the 1 903 Cooperative Act governed the amount-of-water dispute. The Court cannot find any agreement or language in the Alpine record indicating that the parties intended to reserve litigation of the issue of priority despite agreeing that the priority date was July 2, 1902. Further, this Court cannot discern any language in the Alpine Final Decree indicating that, in accepting the parties' settlement agreement, the Alpine trial court believed that the parties were not resolving the core issue regarding the correct priority date for Project landowners. Instead, the Alpine Final Decree indicates that the parties agreed to the Project landowner's priority date for the purpose of resolving the issue of the priority date. That the priority date was also relevant to the trial court's resolution of another claim raised by the United States in its complaint-the extent of each Project landowner's water duty-does not render the agreement meaningless on the issue that the parties intended to resolve when they entered into the stipulation: the priority date for each farmer's water right.

Project-Wide Rights

The Court would also note the suggestion that, as regards Project water rights, the Alpine and Orr Ditch Final Decrees determined only project-wide rights. Pursuant to this suggestion, individual rights,

including individual priority dates for water rights within the Newlands Project, have not yet been determined. This suggestion appears to be based upon the following language from *Alpine II*:

> The governing decrees resulting from these proceedings [the Orr Ditch and Alpine litigations] deal with the Project as a whole. While these previous proceedings have settled many issues, they have not determined whether the particular Project properties involved in this case are entitled to receive Project water.

878 F.2d at 1220-21. While this observation is correct, the suggestion that priority dates have not been determined rests upon an impermissible extrapolation of this observation. Whether particular Project property is entitled to receive water requires resolution of the question, "Does a water right exist for this specific piece of Project land?" The appellate court correctly observed that this question has not yet been answered. In contrast, the priority date of a water for a particular Project property requires resolution of a very distinct question, "If a valid water right exists for a particular property, what are its parameters?" The suggestion that the priority date has not been determined confuses these very distinct questions. Indeed, neither the Orr Ditch nor the Alpine Decree could appropriately answer the former question as to the existence of a right for specific Project property.

The United States filed its complaints on behalf of the Project farmers. This limited the United States to seeking determinations of only those issues applicable to the water rights of all Project farmers such as the priority date and the water duty. As shown by the allegations of the complaint, and as established in the Decrees, these issues were litigated and resolved. In addition, resolution of these issues was beneficial to all non-Project water users. Non-project users would know the maximum amount of water that could be appropriated by Project farmers, and would

the spot where the Project farmers' stood in the water line.

In contrast, resolution of the question whether a water right exists, whether a farmer has the right to stand in line for a specific piece of Project land, depends primarily upon three factors. Recognition of these three factors shows that the question whether a right actually existed for a particular piece of Project property, as opposed to the question of the parameters of Project water rights, could not be adequately resolved by either Decree. First, the existence of a water right requires a determination whether a Project farmer obtained, from the United States, a right to stand in line for the specific Project property. As noted in *Alpine II*, "[It]he rights of particular properties to receive Project water are based on contracts and certificates issued by either the Secretary or the Truckee-Carson Irrigation District (TCID)." While this issue might have been resolved as to some properties in the Decrees, the Court notes that both the Orr Ditch and the Alpine litigations were initiated while the United States was still in the process of transferring water rights. As a result, resolution of whether the farmer had obtained a valid water right for particular Project property was premature as to most of the Project properties when the United States filed its complaints. Further, the identity of the specific pieces of property that would receive water was not critical or relevant as to non-Project users standing in line for water. Critical to non-Project users of Truckee water was the determination of the maximum amount of water that could be diverted by Project farmers, and the priority date pursuant to which the farmers could divert that amount of water. The Orr Ditch Decree provided this critical information as 1500 cfs of water with a priority of July 2, 1902. The Alpine Decree provided this critical information as 3.5 or 4.5 afa for those properties that, as of 1 980, had obtained a valid right to water from the United States, with a priority of July 2, 1902.

The second factor in determining whether a valid water right exists for a particular piece of property is whether the right has been, or is in the process of being, timely perfected. "When any work is necessary to be

done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." *Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-544 (1869). As the United States did not apply water to land, every farmer who obtained a water right from the United States was required to perfect the water right awarded to the United States by actually applying water to land, beneficially using the water to irrigate crops. As with the question whether a farmer obtained a water right from the United States, a determination of the issue whether each farmer perfected his right would be premature as to many particular pieces of Project property. In addition, determination whether a right had been perfected was not necessary to the resolution of the Decrees. As relevant to those users standing in line behind the farmers, the Decrees established the critical and essential parameters of any water right: the water duty and the priority date for each Project farmer.

The third factor relevant to a determination whether a valid water right exists for specific Project property is whether a perfected right has been abandoned or forfeited. This factor queries whether the farmer, after obtaining a right to stand in line from the United States, and after perfecting that right by actually standing in line and taking water, has left the line? Again, given the nature of this factor, it could not have been considered in either Decree. Neither Decree could predict which farmers would abandon or forfeit their rights, and when those rights would be abandoned. A valid water right that existed in 1910 or 1920 might cease to exist in 1 985, after both Final Decrees had been entered. While the Orr Ditch and Alpine Decrees could not resolve whether a water right existed for a particular Project property, both Decrees could resolve the parameters of the water rights sought by the United States on behalf of the farmers. Specifically, the United States sought a determination of the water duty and the priority date, the critical parameters of any water right.

As noted above, both Decrees resolved these parameters as 3.5 or 4.5 afa of water, with a priority of July 2, 1902.

Treating Project Farmers as Obtaining Water from Source

Another argument that has been articulated is that, in determining a priority date for individual Project water rights and applying the relation back doctrine, the Court should engage in a legal fiction that the Project farmers obtained their water rights from the source, rather than from the United States. The argument fails, however, because it ignores that the source of the water diverted and used by the farmers is the Truckee River. As noted above, the Truckee river was subject to a full stream adjudication initiated by the United States. This adjudication resolved, as of 1940, the water duty and priority date for all existing rights to water, perfected or inchoate, whose source was the Truckee River system. Accordingly, res judicata precludes both the Tribe and the United States from arguing that the farmers should be treated as if they appropriated their water directly from the Truckee, rather than as a transfer from the United States. As to the priority date for Project water rights, the parties could have argued, during the litigation of the United States' Orr Ditch complaint, that the court should adopt the unique legal fiction that the Project farmers had appropriated water directly from the Truckee instead of from the United States. As this legal theory was not raised during the stream adjudication determining the priority date of Project water rights; the parties are precluded from raising the argument in this review of transfer applications.

The Court finds that the State Engineer did not err in recognizing that the priority date for all individual Project water rights, as established by the Orr Ditch Final Decree, is July 2, 1902. Accordingly, none of the water rights at issue are subject to forfeiture.

Whether the State Engineer Ignored Clear and Convincing Evidence of Intentional Abandonment.

The Tribe argues that, as to Parcels 1 and 10, the evidence indicated that these parcels contained buildings precluding irrigation for

three years. The Tribe suggests the State Engineer erred by ignoring "the obvious implication" that the permanent structures evidenced an intent to abandon a portion of the water right on these parcels. The Tribe further argues that the State Engineer should have considered the combination of non-use and the presence of buildings as meeting the Tribe's burden of showing that the water right had been abandoned. As noted in footnote 8 in *Alpine III,* Nevada has not recognized that a prolonged period of non-use raises a rebuttable presumption of abandonment. *Alpine III,* 983 F.2d at 1494. Thus, while evidence of non-use and the presence of buildings may be some evidence of an intent to abandon, such evidence standing alone does not require a finding of abandonment. In his ruling, the State Engineer did not ignore the Tribe's evidence, but clearly found that the Tribe presented evidence both of prolonged non-use and of buildings on the property. In light of this finding, the Court cannot agree with the Tribethat the State Engineer did not consider the non-use and presence of buildings, either singly or in combination, in considering whether the Tribe met its burden of showing an intent to abandon.

The State Engineer's ruling is AFFIRMED.

DATED this 11th day of May, 1999.

S/_____

Lloyd D. George

United States District Judge

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF PROTESTED APPLICATION 56226, FILED TO CHANGE THE MANNER AND RULING PLACE OF USE OF THE WATERS OF THE TRUCKEE RIVER HERETOFORE DECREED IN THE ORR DITCH DECREE, STOREY COUNTY, NEVADA.

RULING # 4116

GENERAL

I.

Application 56226 was filed on April 24, 1991, by the Town of Fernley, to change the manner and place of use of 280.78 acre feet,[1] a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.[2] The Town of Fernley wishes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use and to change the place of use to the Fernley utilities water service area. The point of diversion would remain at Derby Dam, located within the N ½ SW 1/4 Section 19, T.20N., R.23E., M.D.B.&M.[3]

II.

Application 56226 was timely protested by the U.S. Bureau OT

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[1]The original quantity of water requested to be changed under Application 56226 was 282.26 acre feet. During the hearing, the Applicant withdrew Parcel No. 6, in the amount of 1.48 acre feet, leaving the amount under Application 56226 to be 280.78 acre feet.

[2]Final Decree in *United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3. (D. Nev. Sept. 4, 1944).

[3]Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993.

Reclamation (Bureau) on the grounds that:

The granting of this application could have detrimental effects on the operation of the Newlands Project by:

1. Reducing the amount of water available to project water users.
2. Reducing the conveyance efficiency of the project
3. Other possible impacts of the proposed change in manner of use and place of use of project water.

The Bureau of Reclamation requests that Application 56226 be denied.[4]

III.

Application 56226 was also timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on the grounds that:

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; and (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery.

3. Granting or approving the above referenced application by

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[4]Exhibit No. 25, Public Administrative Hearing before the State Engineer, May 25, 1993.

the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

4. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened.Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

5. On information and belief, said application involves the transfer of an alleged water right that was never perfected in accordance with federal and state law. Such an alleged water right cannot and should not be transferred.

6. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

8. On information and belief, said application involves the proposed transfer of alleged water rights from land that is not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

9. The application should not be approved because the applicants have not entered into a repayment contract with the United States.

10. The application should not be approved because the proposed use of the Newlands Reclamation Project's water rights is not authorized by federal law.

11. The application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Reclamation Project.

12. The application violates the provisions of Nevada law which protect the endangered cui-ui.

13. The application should not be approved because the applicant has not obtained permission of use federal facilities for the transportation of the water it is seeking to obtain and transfer.

14. On information and belief, the water right that is the subject of the application was obtained from a Newiands Project water user who has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project. The Truckee-Carson Irrigation District also has violated and is continuing LO violate those rules and regulations. Approval of the application therefore would violate the Order, Judgement and Decree entered in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252 (D. D.C. 1973)

15. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the Operating Criteria and Procedures for the Newlands Reclamation Project; and (iii) it will imDair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and

preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the above rererenced application be denied and that an order be entered for such relief as the State Engineer deems just and proper.[5]

IV.

On January 15, 1993, a Pre-Hearing Conference was held in the matter of protested Application 56226. The Truckee-Carson irrigation District (TCID) requested and was granted the status of an intervenor.[6]

V.

An administrative hearing before the State Engineer was held on May 25, 1993.[7]

FINDINGS OF FACT

I.

In addressing change applications, the Orr Ditch Decree sets forth the procedure to accomplish changes in the point of diversion, manner and place of use.

The Orr Ditch Decree provides at page 88, that:[2]

> Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion, and the place, means, manner or purpose of use of the waters to which they are 50 entitled or of any part thereof, so far as

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[5]Exhibit No. 26, Public Administrative Hearing before the State Engineer, May 25, 1993.

[6]Transcript pp. 35-56, Pre-Hearing Conference before the State Engineer, Januar.y 15, 1993.

[7]Exhibit No. 1, Public Administrative Hearing before the State Engineer, May 25, 1993.

they may do so without injury to the rights of other persons whose rights are fixed by this decree.[8]

The State Engineer finds that change Application 56226 is properly before him for consideration and decision.

II.

The protestant Tribe requested that evidence and testimony presented by the Tribe at the previous hearings on the Newlands Project applications be included in the record on Application 56226.[9] This request was opposed by the Applicant on the grounds that it was not a party to any of the previous hearings.[10] At the hearing, all parties attempted to make this record complete and independent of any previous hearings. The State Engineer finds that this record is complete and that the record of previous hearings will not be included in this record.

III.

The Bureau raised the issue of ownership of the water rights requested to be changed by Application 56226 and contended that the

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[8]Recently, the Ninth Circuit Court of Appeals interpreted this controlling provision. The Court concluded that "the manner provided by law" means "[njot only state water law substance, therefore, but procedure as well governs Orr Ditch water rights.' *United States v. Orr Water Ditch Co.*, 914 P.2nd 1302, 1307-1303 (9th Cir. 1990).

[9]Exhibit No. 8, Public Administrative Hearing before the State Engineer, May 25, 1993.

[10]Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 25, 1993.

Applicant had failed to establish a claim of ownership of these rights.[11] The Bureau did not present any evidence or testimony that any other party owned these water rights. Later, the Bureau accepted the Town of Fernley's assertion that it had acquired these rights.[12]

The Applicant submitted evidence[13] and testimony[14] which shows the Town of Fernley paid the operation and maintenance fees or these water rights that are charged by TOID. The Applicant's testimony revealed that all of the water rights are owned by the Town of Fernley.[15] Additionally, TCID, who keeps the ownership records for the water rights within the Newlands Project, certified to the State Engineer that deeds are on file for these water rights that transfer ownership to the Town of Fernley.[16] The State Engineer finds that the owner of the water rights requested to be changed by Application 56226 is the Town of Fernley.

IV.

The protestant Tribe claims that some of the water rights requested to be changed by Application 56226 have been forfeited.[5] A recent decision of the Ninth Circuit Court of Appeals provides guidance as to

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[11]Transcript p. 42, Public Administrative Hearing before the State Engineer, May 25, 1993.

[12]Post Hearing Brief filed by the U.S. Bureau of Reclamation, July 29, 1993.

[13]Exhibit No. 24, Public Administrative Hearing before the State Encineer, May 25, 1993.

[14]Transcript pp. 323-326, Public Administrative Hearing before the State Engineer, May 25, 1993.

[15]Transcript p. 211, Public Administrative Hearing before the State Engineer, May 25, 1993.

[16]Transcript p. 323-325, Public Administrative Hearing before the State Engineer, May 25, 1993.

whether a water right is subject to forfeiture.[17] The Court stated:

> On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.[18]

Previously, the State Engineer concluded that the water rights within the Newlands Project, as set forth in the *Alpine Decree*,[19] "were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute."[20] On appeal, the Ninth Circuit analyzed whether the water rights in the Newlands Project vested in 1902, and concluded that they did not.[21] Rather, the Court held that, as a matter of Nevada law, "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land."[22] However,

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[17]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1993).

[18]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1496 (9th Cir. 1993).

[19]Final Decree in *United States v. Alpine Land & Reservoir Co.*, Civil No. D-183 BRT (D. Nev. Oct. 28, 1980).

[20]*United States v. Alpine Land & Reservoir Co.* , 983 F.2d 1487, 1490 (9th Cir. 1993).

[21]Id. at 1495-96.

[22]Id. at 1496.

the Court did not analyze when the water rights in the Newlands Project were initiated.

The State Engineer must now determine if the appropriations of the water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913. When a right was initiated, that is its priority date, depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law.

The doctrine of relation back has long applied to water appropriations due to the very nature of a water right and the fact that perfecting the right may take time. The Nevada Supreme Court explained the doctrine of relation back in the following way.

> When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.[23]

Accordingly, even though the water was not placed to beneficial use at the time that the first step was taken to secure the water right, so long as the appropriator exercises due diligence, the perfection of the right relates back to the earlier date, the priority date.[24] The state law requirements of "due diligence" and "relation back" apply to reclamation

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[23]*Ophir Mining Co. v. Carpenter,* 4 Nev. 534, 543-44 (1869).

[24]*United States v. Alpine Land & Reservoir Co.* , 503 F. Supp. 877 (D. Nev. 1980); 2 R. Beck, *Waters and Water Rights* § 14.03(d)(l) at 195-97 (1991); *Black's Law Dictionary* 1158 (5th ed. 1979) (relation back is the "principle that an act done today is considered to have been done at an earlier time").

projects.[25]

In this case, the individual farmers could not begin to irrigate lands within the Truckee Division of the Newlands Project until the United States obtained water rights for the Project on July 2, 1902, and completed construction on the Truckee Canal and Derby Dam in 1905.[26] In its analysis regarding the vesting of water rights, the Ninth Circuit distinguished between the water rights obtained by the United States for the Newlands Reclamation Project in 1902, and the water rights appurtenant to particular tracts of land.[27] While this distinction proved important as to when the water rights vested, this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine. The State Engineer finds that the relation back doctrine applies in this situation and the first step taken in the appropriation of the water rights in the Truckee Division of the Newlands Project occurred on July 2, 1902.

Additional evidence further bolsters this finding. Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. Act of March 1, 1905, ch. 46, § 3, 1905 Nev. Stat. 67. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to the United

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[25]4 R. Beck, *Waters and Water Rights* § 36.04(b) at 193 n.118 (1991).

[26]*Nevada v. United States* 463 U.S. 110, 116 (1983).

[27]*United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1495 (9th Cir. 1993).

States Department of Interior by the original water right holder.[28] Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

V.

The Applicant assigned reference numbers to each parcel of land comprising the existing place of use of the water rights that are the subject of Application 56226. Each parcel of land is accompanied by a "contract" for a water right from the United States Department of the Interior.[29] The contracts for the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 were dated prior to March 22, 1913.[30] The contracts for the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19 and 20 were dated after March 22, 1913. The protestant Tribe claims that the water rights whose contracts were dated after March 22, 1913, are subject to forfeiture.[31] No claim of forfeiture is made for those water rights whose contracts were dated prior to March 22, 1913. While not agreeing with this criterion for determining eligibility for forfeiture, the State Engineer finds that the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28

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[28]Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

[29]Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993. The Applicant assigned numbers from 1 through 28, and number 13 was intentionally left blank. Also, the water right appurtenant to parc 1 6 was withdrawn at the hearing.

[30]Exhibit No's. 20-9 and 21, Public Administrative Hearing Dezore the State Engineer, May 25, 1993.

[31]Post Hearing Brief filed by the Pyramid Lake Tribe of Indians, August 16, 1993.

are not subject to forfeiture.

VI.

Of those parcels of land whose water right contracts were dated after March 22, 1913, three parcels have been irrigated at some time during the years 1984 through 1989. Evidence shows that 75% of parcel numbers 8 and 19 and 100% of parcel 20 were irrigated during this period.[32] The State Engineer finds that a continuous five year period of non-use has not occurred for the water rights appurtenant to parcels 8, 19 and 20.

VII.

Of those parcels of land whose water right contracts were dated after March 22, 1913, the protestant Tribe alleges that parcels 1, 3, 9, 10, and 16 have not been irrigated for a significant period of time.[33] Therefore, the Tribe feels that the water rights appurtenant to parcels 1, 3, 9, 10, and 16 should be declared forfeited. As stated earlier, the State Engineer does not believe that these water rights are eligible for forfeiture. Assuming arguendo that forfeiture applies to these water rights, the following sets forth the standard of proof for forfeiture and analyzes the evidence and testimony supporting the allegation of forfeiture for each of these parcels.

The Nevada Supreme Court has held that there must be clear and convincing evidence that the statutory period of non-use has occurred.[34] The Court required this higher standard of proof because the law disfavors

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[32]Exhibit No. 20-8, Public Administrative Hearing before the State Engineer, May 25, 1993.

[33]Exhibit No's. 20-6 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[34]*Town of Eureka v. Office of the State Enoineer of Nevada,* 108 Nev, 826 P.2d 948 (1992).

forfeitures.

Parcel 1 was described as being "bare land, prepared for cultivation" for the years 1949, 1973, and 1977, based on aerial photographs taken those years.[35] This may be interpreted as cultivated land that happened to be lying fallow with no crop, at those times when the aerial photographs were taken.[36] Parcel 1 was again described as "bare land" in 1984, based on the infrared aerial photographs taken on June 19 and 20, 1984, by the Bureau. The Tribe's witness testified that "the farm unit most likely was in disrepair. It wasn't organized or prepared for cultivation..."[37] However, there is no evidence or testimony showing how that determination was made. The State Engineer has difficulty making a finding of continuous non-use with evidence that the land was prepared for cultivation in 1949, 1973 and 1977. Cultivation is generally associated with irrigation.[34] In addition, there was no evidence of non-use for the years between those years the aerial photographs were taken. The State Engineer finds that the testimony and evidence presented for the years through 1984 do not prove by clear and convincing evidence that a continuous five year period of non-use has occurred.

In support of its allegation of forfeiture, the protestant Tribe refers to a composite map prepared by the Bureau.[32] This map was prepared to show lands with surface water rights as of 1984 that were irrigated one or more years from 1984 through 1989. The interpretation of the composite map concluded that parcel 1 was not irrigated in any of those years.[32] However, there is no evidence or testimony on the record indicating how

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[35]Exhibit No. 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[36]Transcript pp. 90-91, Public Administrative Hearing before the State Engineer, May 25, 1993.

[37]Transcript p. 91, Public Administrative Hearing before the State Engineer, May 25, 1993.

the Bureau prepared the composite map or how the map was interpreted. Several questions come to mind related to the determination that parcel 1 was not irrigated: 1. Were aerial photographs taken each of the six years and if so, were they interpreted by a qualified person? 2. Was parcel 1 inspected on the ground each year? 3. Were any of the years classified as dry years, in which the irrigator did not receive his full water entitlement? If so, can a water right be forfeited for non-use i the parcel was not delivered water? 4. What is the resolution of the aerial photographs? Some of the parcels of land in Application 56226 are less than 0.2 acre in area. Lacking answers to these questions, the State Engineer finds that the Tribe failed to provide clear and convincing evidence that parcel 1 was not irrigated for the years 1984 through 1989.

In 1991, parcel 1 was described as "bare land, buildings, and roads."[35] The photograph taken in May, 1993, supports this land description and shows no evidence of irrigation.[38] While there is some question about irrigation of the bare land in 1991 and 1992, there is little doubt that the land on which the buildings stand could not have been irrigated since 1991, when the buildings were first observed. The State Engineer finds that the portion of parcel 1 on which the buildings stand was not irrigated in 1991, 1992, and 1993, which is short of the statutory five years, required for forfeiture.

Parcel 3, in 1949, was described as being "Bare land, prepared for cultivation." In 1973, 1984, and 1991, the land was described as "Farm road."[35] However, in 1977, the land was described as being irrigated.[35] This apparent contradiction can be explained if parcel 3 was not located properly in the interpretation of the aerial photographs taken in 1949, 1973, 1984 and 1991. The Applicant's witness, who is familiar with this area, testified that parcel 3 lies adjacent to the farm road, not on the farm

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[38]Exhibit No. 20-12, Public Administrative Hearing before the State Engineer, May 25, 1993.

road.[39] He also testified that parcel 3 was irrigated in 1984.[40] The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 3.

Parcel 9 was described as having buildings on it in 1977, 1984, and 1991.[35] The photograph taken in 1993, shows the buildings and no sign of irrigation.[38] The existence of these buildings on the property precludes irrigation. The State Engineer finds that a period of non-use, greater than five years, has occurred with respect to parcel 9.

The land use history for parcel 10 is similar to that of parcel 1. "Bare land prepared for cultivation" was observed in 1949, 1973, and 1977. "Bare land' was observed in 1984, and a building was observed in 1991.[34] The photograph taken in 1993, shows homes in what appears to be a subdivision.[38] The State Engineer finds, in the same manner as for parcel 1, that the evidence prior to 1991 is not clear and convincing that irrigation did not take place. The State Engineer further finds that parcel 10 has not been irrigated in 1991, 1992, and 1993, which represents a period of non-use that is insufficient to declare a forfeiture.

In the years 1973, 1977, 1984 and 1991, a building was observed on parcel 16.[34] The 1993 photograph shows a fairly new building that could not have been constructed as long as twenty years ago.[38] There is no evidence or testimony on the record, whether the building observed in 1973, 1977, 1984 and 1991, is the same as that in the 1993 photograph. The Applicant's witness testified that, as ditch water master for TCID, he Personally turned irrigation water onto parcel 16, during the period 1984

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[39]Transcript pp. 249-252, Public Administrative Hearing before the State Engineer, May 25, 1993.

[40]Transcript p. 244, Public Administrative Hearing before the State Engineer, May 25, 1993.

through 1989 (later clarified as 1984 through 1986).[41] The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 16.

VIII.

The protestant Tribe asserts that those water rights in Application 56226, whose contracts were dated prior to March 22, 1913, have been abandoned.[5] The Nevada Supreme Court held that abandonment is the voluntary relinquishment of a water right by the owner, with the intention of forsaking and deserting it.[42] The Tribe presented evidence[43] and testimony[44] that some of the lands to which these water rights are appurtenant, have not been irrigated for a significant period of time. The Tribe feels that a prolonged and unexplained non-use creates a rebuttable presumption of an intent to abandon.[45] However, the Ninth Circuit Court of Appeals found that although the longer the period of non-use, the greater the likelihood of abandonment, there was no support for a rebuttable presumption under Nevada law.[46]

Permanent improvements, such as farm buildings, roads and

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[41]Transcript pp 239-243, 245, Public Administrative Hearing before the State Engineer, May 25, 1993.

[42]*In re Waters of Manse Soring and its Tributaries,* 60 Nev. 280, 285-290, 108 P.2d 311 (1940).

[43]Exhibit No. 20, Public Administrative Hearing before the State Engineer, May 25, 1993.

[44]Transcript pp. 89-100, Public Administrative Hearing before the State Engineer, May 25, 1993.

[45]Post-hearing brief filed by the Pyramid Lake Paiute Tribe of Indians, August 16, 1993.

[46]*United States v. Alpine Land and Reservoir Co.,* 983 F.2d 1487, 1494 (9th Cir. 1993).

canals, have been constructed on some of the parcels.[47] The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights. However, the Tribe presented no evidence or testimony related to the intent to abandon these water rights.

Since the Town of Fernley has owned the water rights at issue here, it has kept the rights in good standing, evidenced by paying the TCID assessments [13,14] and filing appropriate ownership documentation with TCID.[15] The TCID Project Manager testified that the assessments are current.[48] There is no evidence on the record indicating that any previous owner failed to pay the assessments or in any way displayed an ibtent to abandon or forsake these water rights. The State Engineer finds that there is insufficient evidence and testimony on the record to indicate an intent to abandon these water rights.

IX.

The protestant Tribe alleges that the water right appurtenant to parcel 16 has never been perfected and therefore, under Nevada law cannot be changed.[5,49] The Tribe relied upon aerial photographs taken in 1949, 1973, 1977, 1984, 1990 and 1991, to make this allegation. Mr. Edwin Brush, who was the ditch water master for TCID from 1955 to 1987, testified that he personally turned water from the ditch onto parcel 16.[50]

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[47]Exhibits 20-5 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

[48]Transcript p. 326, Public Administrative Hearing before the State Engineer, May 25, 1993.

[49]Exhibit No. 20-6, Public Administrative Hearing before the State Engineer, May 25, 1993.

[50]50 Transcript pp. 239-243, Public Administrative Hearing before the State Engineer, May 25, 1993.

The State Engineer finds that parcel 16 was irrigated and the water right appurtenant to parcel 16 was perfected by putting the water to beneficial use.

X.

The protestant Tribe contends that granting Application 56226 would impair the value of its Truckee River water rights because the Tribe is entitled to all of the unappropriated Truckee River water.[5] The question of the availability of unappropriated water is not at issue. Application 56226 seeks only to change water already appropriated under the *Orr Ditch Decree.* The State Engineer finds that approval of Application 56226 would not cause the Newlands Project to exceed the quantity of water provided for in the *Orr Ditch Decree.* The State Engineer further finds that there would be no impairment of any existing rights on the Truckee River as a result of the approval of Application 56226.

XI.

The protestant Tribe feels that approval of Application 56226 would be detrimental to the public welfare in that it would jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout and adversely affect the recreational value of Pyramid Lake.[5] The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species in the lower reaches of the Truckee River and Pyramid Lake. However, Application 56226 seeks only to change the manner of use and place of use of water already appropriated under the *Orr Ditch Decree.* Therefore, the State Engineer finds that the Newlands water rights set forth under the *Orr Ditch Decree* would not be exceeded if Application 56226 were approved.

The Ninth Circuit Court of Appeals addressed the Tribe's public

interest argument.[51] The Court stated:

> The Tribe's public interest argument cannot be regarded as anything short of an attempted collateral attack on the *Orr Ditch* decree. "[E]veryone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Nevada v. United States,* 463 U.S. at 143, 103 S.Ct. at 2924. The Engineer found that the proposed transfers would not cause the Project to exceed the overall maximum water consumption provided for in the *Orr Ditch* and *Alpine* decrees, and the record supports this finding. Indeed, the Engineer found that these proposed transfers "cumulatively represent a reduction in diversion from the existing places of use which results in less demand on project water."
>
> By establishing the maximum aggregate amount of water to which the Project was entitled, the *Orr Ditch* decree necessarily embodies an evaluation of the competing public interests in supplying Project farmers with sufficient water to grow their crops, and Pyramid Lake with sufficient water to benefit indigeneous[sic] fishes. Because the Tribe has asserted no threat to the public interest apart from those considered in the *Orr Ditch* decree's water rights allocation, the Engineer's conclusion that the transfers do not conflict with the Tribe's water rights satisfies both the public interest aspect and the conflicting rights aspect of section 533.370(3). Moreover, the Engineer's conclusion that the proposed transfers did not threaten to harm the lake's fishes is supported by substantial evidence.

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[51]United States v. Aloine Land & Reservoir Co., 878 F.2d 1217, 1224 (9th Cir. 1989).

The State Engineer finds that Application 56226 is not unlike those applications considered by the Ninth Circuit Court of Appeals except that, Application 56226 seeks also to change the manner of use to municipal. Therefore, the State Engineer finds that the approval of Application 56226 does not threaten to prove detrimental to the public interest.

XII.

The protestant Tribe feels that these applications cannot be approved because they involve the change "from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands."[5] However, the Tribe does not present any legal basis for this assertion. Nevada water aw allows the eligibility for changing the place of use based on the impracticability to irrigate the existing place of use, however, it does not limit changes only to those that meet the eligibility.[52] In addition, the Ninth Circuit Court of Appeals affirmed the fact that the State Engineer is not precluded by statute from granting a change application where it is not impracticable to use the water at the present site.[53] Therefore, the State Engineer finds that Application 56226 cannot be denied on the basis of the Practicability to irrigate the existing place of use.

XIII.

The protestant Bureau feels that the approval of Application 56226 could result in a lower quantity of water flowing to the groundwater basin in the Fernley area.[4] Under present irrigation practices in the Fernley area, the Bureau's witness estimated that each acre of irrigated land returns approximately 1.5 acre feet of the applied 4.5 acre feet, directly to the

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[52]NRS 533.040.

[53]*United States v. Alpine Land & Reservoir Co.,* 878 F.2d at 1217, 1227. (9thCir. 1989).

groundwater aquifer.[54] According to the Bureau's witness, none of this water would recharge the groundwater aquifer if irrigation ceases and the water is used for municipal purposes.[54] The State Engineer finds that the Bureau did not consider the fact that approximately half of the water diverted for municipal use in the Fernley area, flows to the wastewater treatment facility, whose effluent is discharged directly to the groundwater basin via rapid infiltration basins.[55] The State Engineer further finds that the Bureau failed to consider tnat at a conveyance efficiency of 60%, an additional 3 AF/AC is lost to the groundwater aquifer from transmission losses. The State Engineer finds that the flow of water to the groundwater resource in the Fernley area would not be significantly diminished as a result of changing the manner of use from irrigation to municipal.

XIV.

The protestant Bureau contends that approval of Application 56226 would result in a reduction of the conveyance efficiency of delivery of water within the Newlands Project.[4] The Bureau did not have any quantitative evidence to support this contention but was very concerned about the proposed year-round diversions, especially during the non-irrigation season.[56] However, the Bureau has failed to consider that the Truckee Canal has been used for over 90 years for year round delivery of water to Lahontan Dam on the Carson River. A check of the stream flow records collected by the United States Geological Survey reflects

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[54]Transcript pp. 159-160, Public Administrative Hearing before the State Engineer, May 25, 1993.

[55]Transcript pp. 273-276, Public Administrative Hearing before the State Engineer, May 25, 1993.

[56]Transcript pp. 189-190, Public Administrative Hearing before the State Engineer, May 25, 1993.

that the Truckee Canal rarely transports less than 25 cfs.[57] The State Engineer finds that the diversion of water for municipal use as proposed under Application 56226 would not lessen the efficiency of the Truckee-Carson Irrigation District in the delivery of water.

XV.

The Town of Fernley by agreement with TCID, has paid assessments to TCID for all the Newlands Project water rights it acquired, including those rights requested to be changed under Application 56226.[13, 14] The State Engineer finds that approval of Application 56226 will not adversely affect the cost of water for other water users within the district.

XVI.

In many stream systems, a portion of the water diverted for irrigation. finds its way back to the stream as return flow. The return flow is then available for diversion by downstream users. When the manner of use is changed from irrigation to municipal, often there is no return flow back to the stream. To account for this lack of return flow, the *Alpine Decree*[19] allows only the consumptive use portion or 2.99 acre feet per acre to be changed to municipal use.

The *Orr Ditch Decree*[2] contains no such limitation on the quantity of water allowed in a change of manner of use. However, in many cases, the return flow, in a change to municipal use in the Truckee Meadows, is available to downstream users because the treated wastewater effluent is discharged back into the Truckee River system. The State Engineer has approved changes to municipal use, allowing the entire duty to be changed, because there is no reduction in the quantity of water available to downstream users.

In determining whether the consumptive use portion or the entire duty of 4.5 acre feet per acre may be changed under Application 56226,

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[57]See U.S.G.S. gage, Truckee Canal at Wadsworth Station No. 10351300.

the State Engineer must evaluate the impact on the downstream flow of water. The first step is to examine the fate of the return flow off of irrigated land described in Application 56226 as the existing place of use. This land was irrigated with water diverted through the Truckee Canal. The return flow from this land did not flow back into the system and was never available to downstream users.[58] Under Application 55226, where the Town of Fernley would divert water for municipal use, the return flow would also not return to the Truckee Canal, but instead, would be discharged to the groundwater via the rapid infiltration basins.[55] The State Engineer finds that the change to municipal use of the entire duty of 4.5 acre feet per acre, presents no adverse impacts on the downstream users.

XVII.

The protestants Bureau and Tribe believe that Application 56226 should be denied because the Town of Fernley has not complied with Public Law 101-618, in that the Town has not requested approval from the Secretary of the Department of the Interior.[4,5] The State Engineer recognizes the Secretary's authority and responsibility under Public Law 101-618, however, the State Engineer has no authority to enforce the provisions of Public Law 101-618. The State Engineer finds that his approval of Application 55226 in no way releases the Town of Fernley from its responsibility to comply with all applicable federal, state, and local requirements.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter.[59]

II.

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[58]Transcript p. 315, Public Administrative Hearing before the State Engineer, May 25, 1993.

[59]NRS 533.325 and *Orr Ditch Decree,* p. 88.

The State Engineer is prohibited by law from granting a permit under an application to change where:[60]

A. The proposed change, if within an irrigation district, adversely affects the cost of water for other holders of water rights in the district;

B. The proposed change lessens the district's efficiency in its delivery or use of water;

C. The proposed change conflicts with existing rights; or

D. The proposed change threatens to prove detrimental to the public interest.

III.

The *Orr Ditch Decree* sets forth the procedure and authority for applications to change the point of diversion, place and manner of use of decreed waters of the Truckee River.

IV.

The owner of the water rights requested to be changed under Application 56226 is the Town of Fernley.

V.

None of the parties to this action made any claim that the water rights whose contracts were dated before March 22, 1913, are subject to forfeiture. The parcels affected are 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28. While not agreeing with this rationale for the reasons more fully set forth below, the State Engineer concludes that the water rights appurtenant to these parcels are not subject to forfeiture.

VI.

The contracts for the water rights appurtenant to parcels 8, 16, 19 and 20, were dated after March 22, 1913. Based on the evidence and

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[60]NRS 533.370.

testimony on the record, the State Engineer concludes that these parcels were irrigated during the alleged period of non-use. Therefore, even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VII.

The evidence and testimony supporting the allegation of forfeiture of water rights appurtenant to parcel numbers 1 , 3 and 10 do not meet the 'clear and convincing" standard. Therefore, the State Engineer concludes that even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VIII.

There is clear and convincing evidence on the record indicating that parcel 9 has not been irrigated for a period of time greater than five years. If the forfeiture statute were found to apply to the water right appurtenant to parcel 9, then this water right should be declared forfeited. However, for reasons stated below, the State Engineer concludes that the forfeiture statute does not apply to these water rights.

IX.

The State Engineer concludes that none of the water rights at issue here are subject to forfeiture under NRS 533.060. This includes the water rights whose contracts were dated after March 22, 1913. The water rights requested to be changed by Application 56226 were not initiated by permits issued by the State Engineer, which was required under the Nevada Water Law, in effect after March 22, 1913. Instead, the State Engineer concludes that these water rights were initiated under the Reclamation Act of 1902.

X.

The record in this Proceeding contains no evidence that there was ever an intent to abandon any of the water rights requested to Ruling be changed under Application 56226. Evidence shows that the operation and

maintenance changes have always been paid and are current

XI.

The State Engineer concludes that the water right appurtenant to parcel 16 was perfected.

XII.

There is no evidence on the record that approval of Application 56226 will impair the value of any other existing rights or threaten to prove detrimental to the public interest.

XIII.

The State Engineer concludes that approval of Application 56226 will not result in a lower quantity of water flowing to the groundwater in the Fernley Area.

XIV.

Since water has historically been transported through the Truckee Canal on a nearly continuous basis for over 90 years, the State Engineer concludes that said diversions by the Town of Fernley would not lessen the efficiency in the delivery of water to other users within TCID.

XV.

The State Engineer concludes that as long as the Town of Fernley pays the appropriate charges, the approval of Application 56226 will not adversely affect the cost of the water for other water users within TCID.

XVI.

The entire duty of 4.5 acre feet per acre may be changed to municipal use under Application 56226 with no impacts on any exstng rights.

XVII.

The State Engineer does not have the authority to enforce the requirements of federal law, including Public Law 101-618.

RULING

The protests to the granting of Application 56226 are herewith

overruled and Application 56226 is approved in the amount of 280.78 acre feet, subject to existing rights and the payment of statutory fees.

Respectfully submitted,

s/_____

R. Michael Turnipseed, P.E.

State Engineer

RMT/JCP/pm

Dated this 27th day of May, 1994

NOT FOR PUBLICATION

FILED NOV-8 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner-Appellant,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

UNITED STATES OF AMERICA,

Plaintiff-Appellant

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants,

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT;

THE STATE ENGINEER,

Defendants-Appellees.

No. 99-16817

D.C. No. CV-N-A-3-LDG

Town of Fernley; Appeal of State Engineer Ruling No. 4116

ORDER

Before: SCHROEDER, Chief Judge, NOONAN and W. FLETCHER, Circuit Judges.

Chief Judge Schroeder and Judge W. Fletcher have voted to deny the three petitions for rehearing and petitions for rehearing en banc filed by Appellees Truckee Carson Irrigation District, State Engineer, and Town of Fernley, respectively, on August 20, August 20, and August 22, 2001. Judge Noonan voted to grant the same petitions for rehearing and recommended granting the same petitions for rehearing en banc.

The full court has been advised of the petitions for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and the petitions for rehearing en banc are DENIED.

§ 383. - Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, ch 1093, § 8 in part, 32 Stat. 390.)

NRS 533.060 Right to use limited to amount necessary; abandonment of rights; no acquisition of prescriptive right; reservation of rights by state.

1. Rights to the use of water must be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, irrespective of the carrying capacity of the ditch. All the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby.

2. Except as otherwise provided in subsection 4, if the owner or owners of any such ditch, canal, reservoir, or any other means of diverting any of the public water fail to use the water therefrom or thereby for beneficial purposes for which the right of use exists during any 5 successive years, the right to so use shall be deemed as having been abandoned, and any such owner or owners thereupon forfeit all water rights, easements and privileges appurtenant thereto theretofore acquired, and all the water so formerly appropriated by such owner or owners and their predecessors in interest may be again appropriated for beneficial use the same as if such ditch, canal, reservoir or other means of diversion had never been constructed, and any qualified person may appropriate any such water for beneficial use.

3. No prescriptive right to the use of such water or any of the public water appropriated or unappropriated can be acquired by adverse user or adverse possession for any period of time whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise.

4. The State of Nevada reserves for its own present and future use all rights to the use and diversion of water acquired pursuant to chapter

462, Statutes of Nevada 1963, or otherwise existing within the watersheds of Marlette Lake, Franktown Creek and Hobart Creek and not lawfully appropriated on April 26, 1963, by any person other than the Marlette Lake Company. No such right may be appropriated by any person without the express consent of the legislature.

[8:140:1913; A 1917, 353; 1949, 102; 1943 NCL § 7897]—(NRS A 1979, 1161)

NRS 533.085 Vested rights to water not impaired.

1. Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

2. Any and all appropriations based upon applications and permits on file in the state engineer's office on March 22, 1913, shall be perfected in accordance with the laws in force at the time of their filing.

[84:140-1913; 1919 RL p. 3247; NCL § 7970]

§ 533.324. "Water already appropriated" defined

As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the state engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.

HISTORY: 1993, CH. 181, § 1 , p. 321.

NOTES:

EDITOR'S NOTE – Acts 1993, ch. 181, § 2, provides: "1. The legislature declares that it has examined the past and present practice of the state engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in section 1 of this act [NRS 533.324] and finds that those applications have been approved or denied in the same manner as applications involving water applied to the intended use before the application for change is made.

"2. The legislature intends by this act to clarify rather than change the operation of NRS 533.325, 533.345 and 533.425 with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water described in section 1 of this act [NRS 533.324], and thereby to promote stability and consistency in the administration of chapters 533 and 534 of NRS.

"3. The legislature hereby ratifies each approval granted by the state engineer pursuant to NRS 533.325, 533.345 or 533.425 before the effective date of this act [May 27, 1993] for a change of the place of diversion, manner of use or place of use of water already appropriated if the change is consistent with the interpretation of that term now codified in

section 1 of this act [NRS 533.324]."

Acts 1993, ch. 191, § 3, provides: "This act becomes effective upon passage and approval [May 27, 1993], and, to the extent that it ratifies previous decisions of the state engineer in the manner described in section 2 of this act, applies retrospectively as well as prospectively."

EFFECTIVE DATE – This section became effective May 27, 1993.

NRS 533.325 Application to state engineer for permit.

Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the state engineer for a permit to do so.

[Part 59:140:1913; A 1919, 71; 1951, 132]—(NRS A 1991, 859)

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF NEVADA
IN EQUITY, DOCKET NO. A3

The United States of America, plaintiff

vs.

1. Daisy Adams, successor to George Imes and Andrew Drake, et al.

Solicitors for the United States: Ethelbert Ward, John F. Truesdell and Oliver P. Morton, special assistants to the Attorney General, William Woodburn, as former United States Attorney for the District of Nevada; George Springmeyer. United States Attorney for the District of Nevada, and R.O. Withers. Solicitors for numerous defendants are as hereinafter designated.

It is hereby ordered that all persons herein named as owners, grantors and successors be made and considered parties to this action and that all parties herein named as grantees or successors be substituted for their respective predecessors, with all the rights of their grantors and respective predecessors.

ERRATA SUPPLEMENT

Page 8, first column, line 45, "the name of which was changed to, and at the date o this Decree is Sierra Pacific Power Company," should be substituted for "succeeded by Truckee River

Power Company, incorporated."

Page 8, second column, 4th line from the end of subdivision (W), the name "Walliam" should be "William."

In all tabulations where the same appears, the "Solicitor" column should be eliminated.

Page 14, claim 50a, the name "Cardella" should be "Gardella."

Page 17, claim 78, the name "Degioranni" in both instances should be "Degiovanni."

Page 29, claim 209, the following descriptions of lands should be inserted in appropriate columns as indicated:

1/4	In of	1/4	Sec.	T-N	R-E
NW		NW	31	19	20
SE		NW	31	19	20
NE		NW	31	19	20
NW		NE	31	19	20
SW		NE	31	19	20
SE		NE	31	19	20
NE		NE	31	19	20
SW		NW	31	19	20
NW		NW	32	19	20
SW		SW	29	19	20

Page 34, claim 272, the name "Reno Pressed Brick Company" should be "Reno Press Brick Company."

Page 37, claim 335, "283" in "Acre Feet" column should be "382."

Page 39, claim 350a, "388" in "Acre Feet" column should be "361."

FINAL DECREE

This cause having been heretofore heard by the Court and, following argument by counsel, the matter having been referred to George F. Talbot, as Special Master, and the said Special Master having thereafter rendered his report and made his findings, and the same having been approved and adopted by the Court (except as disallowed or modified by the Court) by a certain order termed "Temporary Restraining Order" made and entered in said cause under date of February 13, 1926:

NOW, THEREFORE, in accordance therewith, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That the parties, persons, corporations, intervenors, grantees, successors in interests and assigns and substituted parties above and hereinafter named and their successors in interest and assigns are, and each of them is, as against every other one, hereby adjudged to be the owners of the water rights hereinafter specified and set forth and entitled and allowed to divert and use, from the Truckee River and its tributaries and from the streams, springs, drain and waste waters hereinafter mentioned, and by and through their respective ditches, canals, flumes, dams and reservoirs, for the irrigation of their respective hereinafter described lands, for generating electricity and power, for municipal purposes, for supplyign the people living in cities and towns, for reclamation of arid lands, for watering livestock, for domestic uses and other beneficial purposes, water in

the respective amounts and subject and according to the respective dates of appropriation and priorities as hereinafter stated, found and allowed.

TRUCKEE RIVER DIVERSIONS

Government Rights

INDIAN DITCH

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which wa the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through the Indian Ditch, the intake of which is to be on the left bank of the river in Section 18, T. 22 N., R. 24 E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubit foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the

amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of any inch or 85-100 of one-fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW1/4 of Section 19, in T.20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

LAKE TAHOE STORAGE

Claim No. 4. Under the Reclamation Act and for irrigation and other beneficial uses on lands under said project and on lands within the basins of the Truckee, Carson and Humboldt rivers in Washoe, Storey, Lyon, Churchill and Humboldt counties, in the State of Nevada, and pursuant to notice posted, by direction and authority of the Secretary of the Interior and for and on behalf of the United States, on the right bank of the Truckee River at the site of the dam in said river near Tahoe City and in Placer County, California, and about 500 feet downstream from Lake Tahoe, on the 21st day of May, 1903, plaintiff is entitled to, and is allowed with a priority of that date and during all seasons of the year, to have flow into and to hold and store in lake Tahoe and in a reservoir made of said lake by a dam at said site in said river constructed with the spillway crest thereof six feet above the floors of the flow-ways of said dam as then

existing, all waters of or coming into said river or said lake, both surface and under flow, to the extent of 3,000 cubic feet per second and to the extent of the capacity of said lake as a reservoir made by said dam, to said height and subject to the continuous out-flow through said river from said lake or reservoir so made by said lake or dam, of such an amount of water as plaintiff may desire to release or may discharge from said lake or reservoir not exceeding at any time a flow of 3,000 cubic feet of water per second.

In addition to the above specified rights, the United States is entitled to store, discharge and control water in Lake Tahoe as provided in the judgment and decree filed and entered on June 4, 1915, in the case of the United States, plaintiff, versus The Truckee River General Electric Company, a corporation defendant, in the District Court of the United States in and for the Northern District of California, Second Division, and subject to said decree the United States shall be entitled to discharge from Lake Tahoe an amount of water sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allwoed at will to release and discharge any fo the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, acording [sic] to its priority, through the Truckee River to the Derby Dam and there divert the same, through the Truckee Canal for irrigation, for storage in the Lahontan Reservoir, for generating power and for other purposes. The rights of said defendant Sierra Pacific Power Company (formerly The Truckee River General Electric Company) under said judgment and decree are hereby recognized and confirmed.

Power Ditches

FARAD PLANT

Claim No. 5. The Sierra Pacific Power Company, a corporation owner, is entitled an dallowed to divert at all times from the Truckee River through the Farad Power Flume, which has its intake on the north bank of the Truckee River in the S ½ of Lot 6 in the NW 1/4 of Section 30, Township 18 North, Range Eighteen East, sufficient water, with a priority of the year 1899, to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transportation loss, to the wheel of the Farad Hydro-Electric power plant, 325 cubic feet of water per second and sufficient additional water with a priority of 1906 to deliver, after transporation loss, to the wheel of said plant, 75 cubic feet of water per second, said plant being situate in the SE 1/4 of Section 12, Township 18 N.R. 17 E., for the generation of electric power in said plant.

FLEISH PLANT

Claim No. 6. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Fleish Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of Section 6, Township 18, N.R. 18 E., sufficient water with a priority of February 16, 1904, to deliver, after transportation loss, to the wheel of the Fleish Hydro-Electric power plant, 327 cubic feet of water per second, said plant being situate in the NE 1/4 of the SE 1/4 of Section 30, Township 19 N.R. 18 E., for the generation of electric power in said plant.

VERDI PLANT

Claim No. 7. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Verdi Power Ditch and Flume, which has its intake on the east bank of the Truckee River in the SE 1/4 of the SE 1/4 of Section 19, T. 19 N.R. 18 E. sufficient water, with a priority of October 21, 1909, to deliver, after transportation loss, to the wheel of the Verdi Power Plant 399 cubic feet of water per second, said plant being sitate in the SE 1/4 of Section 89, T.19 N.R. 18 E. for the generation of electric power in said plant.

In addition to such diversion for power purposes, Sierra Pacific Power Company, a corporation, is allowed to divert from said river through the Verdi Power Ditch 220 inches or 5.50 cubic feet of water per second for supplying the Katz Ditch for irrigation to the extent and with the priority hereinafter allowed to this company, for the Katz Ditch under irrigation rights.

In addition to such diversions for power purposes and for so supplying the Katz Ditch with water for irrigation, Sierra Pacific Power Company, a corporation, is entitled and allowed to divert and transport from the Truckee River, through the Verdi Power Ditch and Flume and to deliver to Verdi Lumber Company, a corporation, said Verdi Lumber Company is entitled to have diverted from said river through said ditch and flume by, and to receive from the Sierra Pacific Power Company, 100 inches of water with a priority of the year 1894 for supplying and maintaining the log pond of the Verdi Lumber Company in the Town of Verdi, and for logging and saw mill purposes.

WASHOE PLANT

Claim No. 8. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from

the Truckee River through the Washoe Power Ditch and Flume, which has its intake on the south bank of the Truckee River, in the NW 1/4 of the NE 1/4 of Section 16, T. 19 N.R. 18 E. sufficient water, with a priority of October 27, 1902, to deliver, after transportation loss, to the wheel of the Washoe Hydro-Electric Power Plant 396 cubic feet of water per second, said plant being situate in the SW 1/4 of the SW 1/4 of Section 14, in said township and range, for the generation of electric power in said plant.

Of the water so allowed to be diverted through the Washoe Power Ditch and Flume, Sierra Pacific Power Company is allowed to use during the irrigation season 12.4 inches or .31 cubic feet of water per second, not exceeding a seasonable amount of 50 acre feet for the irrigatin of 12.4 acres of its land as hereinafter described and provided under Washoe Power Ditch under irrigation rights.

Also of the amount of water allowed to be diverted through the Washoe Power Ditch, Sierra Pacific Power Company is entitled and allowed to deliver to the defendant Leonidas Frederick Johnson and he is entitled and allowed to have and receive from Sierra Pacific Power Company, 50 inches or 1.25 cubic feet of water per second, to the seasonal amount of 257 acre feet, for the irrigation of his lands as described and as provided hereinafter under Washoe Power Ditch under irrigation rights.

RENO PLANT

Claim No. 9. The Sierra Pacific Power Company, a corporation owner, is entitled and allowed to divert at all times from the Truckee River through the Reno Power Ditch and Flume, which has its intake on the south bank of the Truckee River 1365 feet north, 35 degrees west from Quarter Section corner between Section 15 and 16, T. 19 N.R. 19 E. sufficient water with a priority of November 1,

1909 to deliver after transportation loss, to the wheel of said plant 46 cubic feet of water per second, said plant being situate in NE 1/4 of NE 1/4 Section 15, in said township and range, for the generation of electric power in said plant.

In addition to such allowed diversions for power purposes through the Reno Power Ditch and Flume, Sierra Pacific Power Company is entitled and allowed to divert from the Truckee River and convey through said ditch and flume and deliver to defendants Sarah McClure, James Murray, William Murray and Sam Murray and their successors, and they are entitled and allowed to have and receive from said company, 50 inches of water for the irrigation of their lands as hereinafter described and provided under Indian Flat Ditch under irrigation rights.

RIVERSIDE MILL DITCH

Claim No. 10. The Riverside Mill Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Riverside Mill Ditch and Flume, which has its intake on the north bank of the Truckee River at a point 84 feet westerly from the center of Chestnut Street in the City of Reno and in the NW 1/4 of the SE 1/4 of Section 11, T. 19, N., R. 19, E., 70 cubic feet of water per second with a priority of May, 1863, for operating the Riverside Flour Mill in the City of Reno and for generating power and for milling purposes.

WADSWORTH POWER PLANT

(Solicitor: James T. Boyd)

Claim No. 13. The Wadsworth Light and Power Company, incorporated, owner, is entitled and allowed to divert at all times from the Truckee River, through the Wadsworth Light and Power

Company Ditch, which has its intake on the north bank of the Truckee River in the NW 1/4 of the SW 1/4 of Section 13, T. 20, N., R. 23, E., Mount Diablo Base and Meridian, 31.3 cubic feet of water per second with a priority of June 26, 1897, for delivering, after an allowed transportation loss of 20 per cent, 25 cubic feet of water per second to the wheel at the pumping and power plant of this company, situated in the SE 1/4 of the SE 1/4 of Section 33, in T.21, N., R. 24, E., M.D.M., for the operation thereof and for pumping and for generating electrical and other power.

WADSWORTH WATER SUPPLY

(Solicitor: James T. Boyd)

Claim No. 14. In addition to the amount of water so allowed to be diverted for generating power, for pumping and the operation of its plant, the Wadsworth Light and Power Company is entitled and allowed to divert at all times from the Truckee River through its said power ditch, for supplying the Town of Wadsworth and the people living in or near this town with water for fire protection, for the irrigation of their lawns, gardens and lands, and for household and other purposes, 3.13 cubic feet of water per second with a priority of June 26, 1897, for the delivery, after an allowed transportation loss of 20 per cent, of 2.5 cubic feet of water per second to the reservoir of said company in the SE 1/4 of the SE 1/4 of Section 33, in T.21, N., R. 24, E., M.D.M., and to said people for said purposes. (See Irrigation Rights for irrigation water allowed under this ditch, No. 635.)

WINTER DITCH REGULATION

The owners and operators of ditches through which the

diversion of water is allowed for generating electricity and power and for milling, mechanical and municipal purposes, and for supplying the inhabitants of any city or town, whenever ice shall collect in any of their ditches, shall be allowed to divert from the Truckee River and use such additional amount of water as may be required for flushing out said ice and so long only as may be required for such flushing, provided that the water diverted for such flushing shall not in any case be more than 20 per cent of the amount which is fixed and allowed by this decree to be diverted through the ditch in which said flushing is done.

All water diverted or used for generating electricity or power or for operating mills or power plants shall be returned directly to the Truckee River after being so used. Extra water for preventing congestion by ice and for flushing ice allowed to be used in ditches supplying water for municipal purposes when required must be returned directly to the river when used for these purposes.

IRRIGATION RIGHTS

The parties, persons and corporations hereinafter named and their grnator and predecessors in interest have acquired rights of appropriation in, and have diverted and appropriated from the Truckee River and its tributaries and used for the necessary irrigation of their respective hereinafter described lands, water in the respective amounts and under the respective priorities as stated in the following table. As shown by the following tabulations and columns, each of the parties, persons and corporations named in the columns headed "Owner," directly or by his, her or its grantor or predecessor in interest, on and continuing after the date in the columns headed "Date of Priority" and opposite his, her or its name or in connection therewith, and through the ditch or ditches named in the column

headed "Ditch" and opposite his, her or its name or described lands, for the necessary irrigation of his, her or its lands as described opposite his, her or its name and in the columns under the words "Acres Irrigated" and following columns, diverted and appropriated water in the amount or amounts stated opposite his, her or its name or described lands and in the columns, headed "Approximate Diversion," and water sufficient to deliver to his, her or its said lands after transportation loss, the amounts in flow and acre feet per season stated opposite his, her or its name or described lands and in the columns under the words "Amount Allowed Delivered to Land.":

[TABLE OMITTED]

GENERAL PROVISIONS

In the foregoing table and columns pertaining to irrigation water rights the word, "Direct," means that the acreages thereunder are irrigated by drain or waste water hereby allowed and ordered for the irrigation thereof; the word, "Season," means the time in any calendar year when irrigation may be needed; the word, "Priority," means the time when the water right was initiated. "Inch" means one-fortieth (1/40th) of one cubic foot per second, which, in general is the amount of water which will flow through an orifice having an area of one square inch, under a pressure of six (6) inches at the center of one square inch, under a pressure of six (6) inches at the center of the opening. "Acre Foot," means the amount of water which will cover an area of one acre to a depth of one foot.

All of the above described ditches, lands and sections are in townships north and ranges east, Mount Diablo Base and Meridian.

All of the irrigated lands are in the Astate of Nevada, except a part of the tracts listed under Dog, O'Neill, and Sunrise creeks. All of the ditches, canals and flumes are in the State of Nevada excepting the Farad and the upper end of the Fleish. Lake Tahoe is partly in Nevada and partly in California and the outlet of the lake to the Truckee River and the dam controlling the storage in the lake are in the State of California.

Without the application of water thereto the above described lands are dry and arid and irrigation is necessary for the production of valuable crops thereon. The respective amounts of water hereinbefore stated to have been appropriated for or used on these lands, are in each instance as specified therefor necessary and sufficient for the reasonable and economical irrigation of crops thereon other than grain, potatoes, corn and beets. These do not need to be irrigated for so many months as alfalfa and pasture. Only two-thirds of the amount of water in acre feet hereinbefore specified or allowed for the irrigation of any of the above described tracts of land is necessary for, or should be or is allowed for the irrigation of grain grown thereon. Only four-fifths of the amount of water in acre feet designated above for the irrigation of said tracts of land is necessary for, or should be or is allowed for, the irrigation of potatoes, corn or beets grown thereon. An additional amount of ten per cent of the quantity of water hereinbefore specified in acre feet for the irrigation of any of the above described lands is necessary for and should be and is allowed for the irrigation thereof during the first year that alfalfa is sown thereon, whether the alfalfa be sown with or without grain.

The amounts of water which the parties to this action have appropriated and used for purposes other than the irrigation as stated

above are necessary and sufficient for the uses for which they have been appropriated.

The above named parties who so appropriated water for irrigation have also used and in addition thereto are entitled and allowed to use water for livestock and domestic purposes, but only in such amounts as may be necessary for watering stock and for domestic purposes; provided that the priority in respect of the use of water for livestock and domestic purposes of any person shall be identical with the priority of such party for irrigation.

IT IS FURTHER ORDERED AND DECREEED that that certain agreement known as the Truckee River Agreement, dated July 1, 1935, entered into by the United States of America, party of the first part, Truckee-Carson Irrigation District, party of the second part, Washoe County Water Conservation District, party of the third part, Sierra Pacific Power Company, party of the fourth part, and such other users of the waters of the Truckee River as may have or shall become parties of the fifth part, which agreement provides (among other things) for the upstream storage of the waters of the Truckee River and its tributaries, be and the same is hereby approved, adopted by the Court and made a part of the decree and shall be binding as between the signatory parties to said agreement.

Water for irrigation is allowed to be used at any time, provided that the amount applied to the land during any calendar year shall not exceed the quantity in acre feet allowed to the land.

No owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season.

If it shall appear at any time in regard to the actual use and need of water for irrigatin that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed by this decree for application to the land and only the quantity needed for the irrigation thereof.

When any other user will thereby be deprived of any part of the water to which he is entitled, no ditch owner or user shall be allowed to divert away from the stream extra water for regulating the flow in any ditch.

The parties, persons, corporations, intervenors, grantees, successors in interest and substituted parties hereinbefore named, and their and each of their servants, agents, attorneys, assigns and all persons claiming by, through or under them and their successors, in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other

waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree, and each and all of said parties, persons, corporations, intervenors, agents, attorneys, servants, assigns and successors in interest; and all persons claiming by, through or under them, are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Truckee River or its tributaries or with waters of any of the creeks or streams, or with any of the other waters hereinbefore mentioned, so as to in any manner prevent or interfere with the diversion, use and enjoyment of the waters of any of the other persons or parties as allowed or adjudicated by this decree, having due regard to the relative priorities herein set forth; and each of the said parties and persons and each of their agents, servants, attorneys and employees is hereby enjoined and restrained from ever taking, diverting, using or claiming any of the water so decreed, in any manner or at any time so as to in any way interfere with the prior rights of any other persons or parties having prior rights under this decree, as herein set forth, until such persons or parties having prior rights have received for their several uses the waters hereby allowed and adjudged to them.

Except as herein specifically provided no diversion of water into any ditch or canal, in this decree mentioned shall be permitted except in such amount as shall be actually, reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree. The amounts of water hereinbefore allowed are declared to be sufficient for the uses herein mentioned, and any and all use of water in excess of such decreed amounts is declared to be wasteful, and all wasteful or excessive use of water is hereby prohibited.

In any case where water is obtained from two or more sources, the aggregate amount of the combined waters from such sources which may be used, shall not exceed the amount required for such use as herein determined.

Whenever in this decree words of ownership are used in connection with any irrigated lands, such words shall not adjudicate, determine or affect any property rights therein, and this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to the diversion and use of water as herein determined and established. In the cases where, by this decree, water is allowed to be diverted through any ditch by the owner thereof for another party the conditions of any contractual relations existing between them are not hereby determined.

A Water Master shall be appointed by this Court to carry out and enforce the provisions of this decree and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Master, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch or canal owners or water users so disobeying or disregarding such proper orders, rules or directions, and the Water Master shall promptly report to the Court his said action in such case and the circumstances connected therewith and leading thereto. Whenever the necessities of the situation appear to the Court to so require, the Court shall authorize the employment by the Water Master of such person or persons to assist the Water Master as the Court may deem necessary to properly carry out the provisions of this decree and the orders of the Court. The terms of employment, expenses and compensation of said Water Master and his assistants, the payment

thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make. The compensation and expenses of the Water Master and his assistants shall be borne by the parties whose rights are adjudicated by this decree in the following manner, to-wit: One-third by the United States, one-third by the Sierra Pacific Power Company, and the remaining one-third by the remaining persons or corporations whose rights are adjudicated by this decree. Any person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The owner or owners of each ditch or canal herein authorized to divert water from the Truckee River or any of its tributaries, or from any ditch or canal or other waterway receiving water therefrom, shall, within sixty (60) days after the entry of this decree, or such lesser time as may be fixed by the Water Master, install and thereafter at all times properly maintain in such ditch, canal or other waterway, a reliable, sufficient and easily operated regulating headgate and locking and measuring devices, to be approved by the Water Master, whereby the water diverted into such ditch, canal or other waterway at any and all times may be properly regulated and correctly measured.

The stored water of any reservoir, including Lake tahoe, may be turned into and carried in the channel of any natural stream and mingled with the waters thereof and diverted therefrom for the proper uses of the persons or parties entitled thereto. The Water Master, upon timely notice, shall so regulate the headgates along the

streams and do and direct to be done such other things as may be needful to transport such stored water and deliver the same to the person or persons entitled thereto. All persons are hereby prohibited from in any way interfering with any such stored water while the same is being legally carried to the persons or parties entitled thereto.

The quantities of water permissible to be diverted by the owners of the several ditches, through said ditches, on account of the several priorities herein decreed, are decreed subject to the obligations of said owners to divert and use water only at such times as needed and only in such amounts as may be required under a reasonable, economical and beneficial use. Rotation, or the combining and exchanging of hte use of water between ditches and among users shall be permitted when necessary in order to obtain reasonable economy in the use of the water of the river or other streams, or in order to give to each ditch or user a more advantageous irrigation head, provided that such rotations shall not injuriously affect any of the rights determined and allowed by this decree. The Water Master may arrange for such rotations and consult with and endeavor to obtain the agreements of the various water users thereto, as the occasion may require and shall promptly report to this Court his actions in the premises.

All users of water allowed by this decree a flow of less than one inch per acre for his, her or their respective lands may, with the consent of the Water Master or by his direction to the owners or person in charge of the ditch through which the water is conveyed, use when needed for the irrigation of his, her or their land, a larger flow than specifically allowed by this decree, up to and not exceeding one inch per acre, provided the amount of water used during any calendar year shall not exceed the seasonal acre feet

allowance for the land, and that the flow allowed would not, if continuous, deliver in any one month in excess of twenty-five (25) per cent of the seasonal allowance in acre feet heretofore in this decree specifically allowed for said lands.

Whenever any person or party shall not be receiving the amount of water to which he is entitled under this Decree, the Water Master shall, upon request, open, close, lock and regulate the necessary headgates, ditches and other works used for the diversion and application of such waters as to apportion the same as herein provided, and for that purpose may enter upon the lands of any and all persons having rights adjudicated by this Decree.

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversin and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.

The State of Nevada is not a party to this suit but the rights of the State to water through different ditches which divert from the Truckee River for th State and numerous parties to this action have been estimated for convenience and purposes of administration.

The several parties to this suit shall pay and bear their own costs.

Said Sierra Pacific Power Company is the identical party and corporation referred to herein and in the "Temporary Restraining Order" made and entered in said cause on February 13, 1926, as the "Truckee River General Electric Company, a corporation", the name of said corporation having been heretofore changed, pursuant to law,

from the Truckee River General Electric Company to Sierra Pacific Power Company.

The foregoing adjudications set forth in Claims Numbers 1 to 744, inclusive, of this Decree are based upon conditions existing at or prior to the entry of said Temporary Restraining Order herein on February 13, 1926; and such adjudication shall not be deemed to limit, reestablish, or otherwise affect any rights acquired, created or lost subsequently thereto by conveyance, transfer, abandonment, non-user, contract (including said Truckee River Agreement) or otherwise, but the rights of the United States shall be as herein adjudicated as of the date of this decree save only as the same may be affected by said Truckee River Agreement.

Done in open court this 8th day of September, 1944.

FRANK H. NORCROSS, District Judge.

United States of America, Plaintiff, v. Alpine Land & Reservoir Company, a Corporation, Defendant, and Nevada State Engineer, Defendant-Appellee, Pyramid Lake Paiute Tribe of Indians, Applicant-Appellant, Truckee-Carson Irrigation District; Water Right Transfer Applicants, Applicants-Appellees.

No. 90-16460
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
983 F.2d 1487 (9th Cir. 1992)
Argued and Submitted June 26, 1991,
Decided May 26, 1992
As Amended January 21, 1993

Opinion by Judge Brunetti.

The Pyramid Lake Paiute Tribe of Indians (the "Tribe") protested the application of farmers in the Newlands Federal Reclamation Project (the "Project") to transfer water rights. The Nevada State Engineer (the "Engineer") approved the applications and the district court affirmed. We affirmed in part, reversed in part, and remanded in *United States v. Alpine Land &*
Reservoir Co., 878 F.2d 1217 (9th Cir. 1989).

On remand, the district court again [**2] affirmed the Engineer's approval of the application. The Tribe again appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse and remand.

I.

In 1980, the District Court of Nevada approved a proposed decree ("*Alpine Decree*" or "decree") submitted by a Special Master declaring the rights of all interested parties to water from the Carson River and its tributaries. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir.) ("*Alpine I*"),

cert. denied, 464 U.S. 863 (1983). Once the decree became final, many Project farmers filed applications to transfer water rights appurtenant to other Project land ("transferor properties") to their land ("transferee properties").[1] While the transferor properties are not presently using their appurtenant water rights, the transferee properties are lands "lacking water rights but which long have been irrigated with Project water." *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1219 (9th Cir. 1989) ("*Alpine II*").

The Tribe filed timely protests to the transfer applications in accordance with the provisions of the decree and Nevada statutes.[2] The protests were based on several grounds. Relevant to this appeal is the Tribe's claims that twenty-five of the applications involve water rights which were never perfected or were abandoned or forfeited under Nevada law.

The Engineer rejected the Tribe's protests and approved all

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[1]From 1927 to 1969 the Newlands Project was operated by appellee Truckee-Carson Irrigation District. During this time, with the apparent acquiescence of TCID, transferee property landowners used Project water even though they had no contract or certificate entitling them to do so. *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1222 (9th Cir. 1989).

[2]The area surrounding Pyramid Lake is the aboriginal home of the Tribe and the present site of the Pyramid Lake Indian Reservation. Pyramid Lake's sole source of water is the Truckee River. Because of the diversion of water from the Truckee River for use by Project landowners, the surface area of the Lake has decreased over the years, threatening the survival of indigenous fish species, including the cui-ui sucker and the Lahontan cutthroat trout. *Alpine II,* 878 F.2d at 1219-20. The Tribe contends that the proposed transfers violate various aspects of Nevada law and seeks to nullify these proposed transfers, claiming that the result will decrease the Project's net consumption of Truckee River water and thereby increase the water flow into Pyramid Lake. *Id.* at 1221.

applications. The Engineer made no specific findings regarding the transferor property water rights. Rather, the Engineer considered the issues of perfection, abandonment, and forfeiture on a Project-wide basis only. "The record of evidence," the Engineer found,

> indicates that the water has been used continuously by project farmers. The fact that individual project farmers were not using the water on the exact acreage for which they contracted on an acre-for-acre accounting was addressed and disposed of in Alpine [I].

Engineer's Ruling at 14 (Sept. 30, 1985). The Engineer, relying on *Alpine I,* thus found the transferor property water rights were valid regardless of the alleged failure to perfect the water rights on the transferor property so long as water was beneficially used, albeit improperly, somewhere on Project land. Based on this Project-wide analysis, the Engineer concluded "there was neither intent to abandon nor intent to forsake the water or the right to use it." *Id.* at 15. The Engineer also held that the transferor water rights were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute.

The Tribe, pursuant to the procedures set forth in the decree and approved by us in *Alpine I,* appealed the Engineer's decision to the district court. The district court did not discuss the merits of the Engineer's ruling on perfection, abandonment, and forfeiture, finding these issues "were improperly raised before the Engineer." The district court reasoned that, under the decree, these claims should have been brought before the Water Master. The Tribe then appealed the district court's decision to this court.

In *Alpine II,* we found that the Engineer could, under the decree, "consider the Tribe's objection that the applications should be rejected due to alleged forfeiture or abandonment," *Alpine II,* 878 F.2d at 1225. We found that it was error for the district court to conclude that Nevada law is

wholly irrelevant and that it is inappropriate for the Engineer to adjudicate the issues of perfection, forfeiture or abandonment, and we remanded to the district court with instructions to evaluate the Engineer's ruling on the applicability of Nevada's statutory forfeiture provisions and lack of intent to abandon. *Id.* at 1229.

We also rejected the Engineer's validation of the transferee properties' use of water. The *Alpine* decree, we stated, did "not determine[ ] whether the particular Project properties involved in this case are entitled to receive Project water." Id. at 1220-21. *Alpine I* did not, as the Engineer believed, recognize an informal transfer of water rights to the transferee properties or the inapplicability of Nevada's forfeiture statute. Id. at 1228-29. Although we stated in *Alpine I* that "historically, no distinction was made between landowners with and without limiting contracts," *Alpine I,* 697 F.2d at 856, our analysis "was premised on the contractual rights of the farmers to receive Project water in some amount, rights [the transferee property landowners] simply do not have." *Alpine II,* 878 F.2d at 1228.

On remand, the district court, without further briefing, fact finding, or a hearing on the matter, affirmed the Engineer's findings. The court quoted the Engineer's ruling at length, including those aspects of the ruling rejected in *Alpine II,* and concluded that the Engineer's analysis was "eminently correct." The district court did not address the Tribe's claim that the water rights were not perfected. The Tribe timely filed this appeal.[3]

II.

The Tribe protested the transfer applications on the ground that the "applications involve the transfer of alleged water rights that were never

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[3]The Tribe also filed a motion to certify certain questions raised in this appeal to the Nevada Supreme Court. The appellants oppose the motion. Because the law of Nevada is clear, see *Alpine II,* 878 F.2d at 1226, we decline to certify the questions suggested by the Tribe. See *In re McLinn,* 744 F.2d 677, 681 (9th Cir. 1984).

perfected in accordance with federal and state law." The Tribe argues that the district court, on remand from *Alpine II,* improperly failed to consider the Engineer's findings regarding this allegation. Appellee TCID argues that the district court had no obligation, under Alpine II, to consider the Tribe's perfection claim, and that the issue is, therefore, not properly before this court.[4]

A

[1, 2] On remand, the district court "must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977). See also *Colville Confederated Tribes v. Walton,* 752 F.2d 397, 401 (9th Cir. 1985) (on remand, district court shall act in accordance with the mandate "in light of [the] opinion" (internal quotations omitted)), cert. denied, 475 U.S. 1010, 89 L. Ed. 2d 300, 106 S. Ct. 1183 (1986). The concluding paragraph of *Alpine II* states:

> The district court's error was to conclude that Nevada law is wholly irrelevant, and that it is inappropriate for the Engineer to adjudicate the issues of *perfection, forfeiture, or abandonment.* Upon remand, the district court must evaluate the merits of the Engineer's ruling that Nevada's statutory *forfeiture* provisions do not apply and his finding that under Nevada's common law of *abandonment* the transferor landowners have not indicated an intent to abandon their water rights.

878 F.2d at 1229 (emphasis added). TCID quotes the second sentence of this paragraph in isolation to support its argument that the district court was instructed to consider the issues of forfeiture and abandonment only.

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[4]The Engineer concedes that the perfection issue was within the scope of the *Alpine II* remand. Appellee Engineer's Opening Brief at 2 n.1.

We reject TCID's argument, as *Alpine II* clearly required the district court to review the Engineer's ruling regarding the perfection claim. It would make little sense to hold, in *Alpine II,* that the district court erred by failing to consider the perfection issue, remand the case, then now hold that the failure to again consider the issue was not erroneous.

A reading of *Alpine II* in its entirety also supports the Tribe's view. In *Alpine II,* we considered the Tribe's claims of lack of perfection, abandonment, and forfeiture in the context of a single issue: whether the district court erred by failing to address these claims. We held that such failure was indeed error. *Id.* at 1227-28. The mere failure to specify each of the unaddressed claims in the concluding sentence of the opinion does not excuse the district court from considering the claims on remand, as those claims are the basis for the *Alpine II* analysis and holding regarding transferability of the water rights. The subject of the litigation is the transfer of water rights within the Newlands Reclamation Project in Nevada, *id.* at 1219, and the State Engineer has no right to transfer water rights which have never been put to beneficial use. "An appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use." *Id.* at 1226 (quoting *Basin Elec. Coop. v. State Bd. of Control,* 578 P.2d 557, 563-64 (Wyo. 1978)). In *Alpine I,* we reviewed the legislative history of the 1902 Reclamation Act. We found that under Section 8 of the Act "appropriated water must be applied to irrigation; it cannot be severed as a commodity for use on land to which it would not be appurtenant." *Alpine I,* 697 F.2d at 858. Representative Mandell described a water right under the Act as only extending "'to the use of the water on and for the tract originally irrigated'; there is no general 'property in water with power to sell and dispose of the same elsewhere and for other purposes than originally intended.'" *Id.* (quoting 35 Cong. Rec. 6679 (1902)).

The issue of perfection was specifically before the district court on remand and the district court's failure to address this issue was erroneous.

B

The Engineer argues that the district court's failure to consider the lack of perfection claim on remand is harmless because, under Nevada law, a water right need not be perfected in order to be transferred.

[3] Nevada water law is "special in character, and the provisions of such law not only lay down the method of procedure but strictly limits it to that provided." *Application of Filippini,* 66 Nev. 17, 202 P.2d 535, 540 (Nev. 1949). *See also United States v. Cappaert,* 508 F.2d 313, 319 (9th Cir. 1974) (Nevada water rights may only be acquired as provided by statute), *aff'd,* 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976); Nevada Revised Statutes (NRS) 533.040 (water rights may be transferred "in the manner provided in this chapter, and not otherwise"). The statutes setting forth the procedure for transferring water rights in Nevada refer to "changing the place of diversion, manner of use or place of use of *water already appropriated*." NRS 533.325 (emphasis added); *see also* NRS 533.345, 533.425. The Engineer concedes that this issue depends upon the interpretation of "water already appropriated" and argues the phrase "means all rights to the use of water, including inchoate rights such as permits where the water has not yet been put to beneficial use." Engineer's Supplemental Brief at 4. The Tribe asserts that appropriation is synonymous with perfection, which requires the actual application of the water to beneficial use on the property. *See Nevada v. United States,* 463 U.S. 110, 126, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983) ("the law of Nevada, in common with most other Western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land"); *Alpine I,* 503 F. Supp. at 885 (the nature of a water right is such that it takes time to perfect the right; when any work is necessary to complete the appropriation, the law gives a claimant a reasonable time to do it, and the appropriation is not deemed complete until the actual diversion or use of water)

[4, 5] In *In re Manse Spring,* 108 P.2d 311 (Nev. 1940), the

Nevada Supreme Court stated: "To constitute a valid appropriation of water, there must be an actual diversion of it, with intent to apply to beneficial use, followed by an application to such use in a reasonable time." *Id.* at 314 (quoting *Walsh v. Wallace,* 67 P. 914 (Nev. 1902));[5] *see also* NRS 533.035 ("beneficial use shall be the basis, the measure and the limit of the right to the use of water"), NRS 533.070 (the quantity of water that may be appropriated "shall be limited to such water as shall reasonably be required for the beneficial use to be served"). The definition of appropriation in *Manse Spring* is consistent with the plain meaning[6] of the phrase in western water law. See 1 Robert E. Clark, *Waters and Water Rights* § 19.2 (1967) (appropriation requires "reasonable beneficial use"); 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States,* 157 (1971) (appropriation "contemplates the acquisition of rights to the use of water by diverting water and applying it to reasonable beneficial use for a beneficial purpose"); Tarlock, *Law of Water Rights and Resources,* §§ 5.15, 5.16 (1990) (physical diversion and beneficial use are essential elements of a valid appropriation); *Black's Law Dictionary* 93 (5th ed. 1979) (appropriation of water "consists in the capture, impounding, or diversion of it . . . and its actual application to some beneficial use").

[6] The Engineer provides no authority for its broad interpretation of "water already appropriated" and our research reveals none. In *Alpine II*

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[5]In cases where beneficial use may be made of the water without diverting it, beneficial use alone is sufficient to constitute appropriation. *Nevada v. Morros,* 104 Nev. 709, 766 P.2d 263, 267 (Nev. 1988) ("Nevada water law recognizes and permits water appropriation in situ, without a diversion, for public recreation purposes").

[6]Under Nevada law, "words should be given their plain meaning unless this violates the spirit of the act." *Application of Filippini,* 66 Nev. 17, 202 P.2d 535, 538 (Nev. 1949).

we accepted the Tribe's argument that the law of Nevada requires that for the perfection of a water right for agricultural purposes the water must be beneficially used by actual application on the land, and that the only transferable water right is one that has been appropriated to a beneficial use. See *Alpine II,* 878 F.2d at 1226. We fully explored this issue in *Alpine II,* and we will not revisit it here.

[7] The Engineer also relies on NRS 533.370(3), which describes certain circumstances under which the Engineer is required to reject the application.[7] The failure to beneficially use the water is not among the listed circumstances and, the Engineer argues, "only the factors of section 533.370(3) preclude the State Engineer from granting a transfer application when a water right exists." This section, however, does not provide the sole criterion for rejecting applications. *See Alpine II,* 878 F.2d at 1227 (citing NRS 533.070, 533.040). In addition, we do not find this statute and the requirement of beneficial use inconsistent. We read NRS 533.370(3) as providing criteria for rejecting applications to transfer rights to water which is "already appropriated." An application to transfer rights to water not already appropriated - i.e., not beneficially used on the transfer property - would not constitute a proper application and therefore be ineligible for consideration under this section.

Under Nevada law, the appropriation of water requires, at a minimum, the actual application of the water on the transferor property to beneficial use. Because Nevada's statutory procedure for transferring water rights requires the prior appropriation of the water, the district court's

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[7]NRS 533.370(3) provides in pertinent part:
Where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interest, the state engineer shall reject the application and refuse to issue the permit asked for.

failure to consider this issue on remand was not harmless.

C

Merely addressing the Engineer's ruling regarding the Tribe's claim of lack of perfection would be insufficient; the correct law must also be applied. The Engineer's Project-wide analysis of beneficial use was rejected in *Alpine II.* Without this "informal transfer" theory, there is no basis, in the absence of further fact finding, for concluding the transferee properties have rights to water. *Alpine II,* 878 F.2d at 1228-29. On remand, the fact finder must determine whether the specific water rights sought to be transferred are rights to "water already appropriated" as we have construed this phrase.

III.

The parties agree that Nevada's common law of abandonment applies to this case. The Tribe argues that the Engineer and the district court based their abandonment findings on an incorrect legal standard. The appellees, though conceding that the basis for the Engineer's finding was incorrect, argue that substantial evidence supports his finding.

[9-12] Abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it." *Manse Spring,* 108 P.2d at 315 (quoting 2 *Kinney on Irrigation and Water Rights* § 1118 at 2020 (2d ed.)). The issue of abandonment is "a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray,* 95 Nev. 782, 603 P.2d 262, 264 (Nev. 1979). Nonuse of water by the owner of a water right is some evidence of an intent to abandon the right. *Franktown Creek Irrigation Co. v. Marlette Lake Co.,* 364 P.2d 1069, 1072 (Nev. 1961); *Manse Spring,* 108 P.2d at 316.[8]

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[8]The Tribe, relying on authority from other western states, argues that a substantial period of nonuse creates a rebuttable presumption of abandonment. Though the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable

[13] The decree provides that the decision of the Engineer "shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decision." *Alpine Decree,* Administrative Provisions Par. 7; *see also* NRS 533.450(9) (same). We review the Engineer's findings on abandonment for an abuse of discretion. *State Engineer v. Curtis Park Manor Water Users Ass'n,* 101 Nev. 30, 692 P.2d 495, 497 (Nev. 1985); *Revert,* 603 P.2d at 264, 265.

The Engineer found that the use of water "by Project farmers" was sufficient to find the absence of intent to abandon the water rights appurtenant to the transferor properties. Relying on our decision in *Alpine I,* the Engineer apparently believed "that this court has accepted the de facto transfer of water rights to Project properties lacking water rights." *Alpine II,* 878 F.2d at 1228. We expressly rejected this reasoning in *Alpine II,* stating that *Alpine I* "in no way approved the so-called 'informal transfer' of water rights." *Id.* "The critical defect with the transferee properties," we stated, "is that they generally have no right to receive Project water. The landowners do not hold contracts or certificates entitling [the transferee] properties to be irrigated." *Id.* at 1229. The proper inquiry for the Engineer and the district court, therefore, is whether the individual transferor water rights were abandoned by the transferor property owners. Because the Engineer did not apply the correct law in determining intent, he has abused his discretion. For the same reason, the district court's approval of the Engineer's findings is erroneous.

The Engineer argues that there is substantial evidence to support his findings when the correct analysis is applied. We, however, are not in a position to evaluate facts not considered or found below. The Engineer's argument only illustrates the need for further determinations by a proper fact finder.

IV.

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presumption under Nevada law.

We next consider the applicability of the Nevada statute providing for the forfeiture of water rights. The only requirement to prove forfeiture of water rights is to show a failure to use the water beneficially for five successive years. See NRS 533.060(2). Forfeiture thus differs from common law abandonment because an intent to relinquish a right is not required for forfeiture. *Manse Spring,* 108 P.2d at 315. Under Nevada law, however, the forfeiture statute does not apply to water rights that vested before March 22, 1913, when the statute took effect. *See* NRS 533.085;[9] *Manse Spring,* 108 P.2d at 316.

The Engineer found that the forfeiture statute did not apply to the transferor property water rights because "the existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized Lahontan Dam in 1902." Engineer's Ruling at 14.

The district court affirmed the Engineer's approval of the transfer applications, but not because it agreed that Nevada law made the forfeiture statute inapplicable. Instead, the district court adopted an alternative rationale that Nevada law generally did not apply.

We rejected this theory in *Alpine II* and determined that Nevada law does apply to the proposed transfers. We instructed the district court to "evaluate the merits of the Engineer's ruling that Nevada's statutory forfeiture provisions do not apply." *Alpine II,* 878 F.2d at 1229. On remand, the district court found that the Engineer's conclusion that the Nevada statutory forfeiture provisions were inapplicable was "eminently

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[9]Section 533.085 provides in pertinent part:
Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

correct" because, the district court found, the rights vested in 1902.

[17] The district court erred by assuming that all the water rights in question vested when the United States obtained water rights for the Project in 1902.[10] This amalgamation of water rights, obtained by the United States for the entire Project, is not the relevant set of rights. Instead, the rights at issue are the rights appurtenant to particular tracts of land that are the subject of the twenty- five contested transfer applications.

[18-19] Determining when those rights vested is a matter of Nevada law. Vested water rights are those that have "become fixed either by actual diversion and application to beneficial use or by appropriation, according to the manner provided by the water law, and [are] regarded and protected as property." *Filippini,* 202 P.2d at 537. A water right may vest upon diversion and beneficial use, by permit "procured pursuant to the statutory water law relative to appropriation," or by "an actual diversion . . . with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time." *Id.* at 537-38 (internal quotations omitted).

The individual water rights at issue here were delivered by contract by the United States from its accumulated water rights in the Project to the transferor landowners. For the reasons discussed above, the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land.

[20] According to the Nevada Supreme Court, the Nevada

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[10]"In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates from 1865 to 1902. These rights were conveyed to the United States by private land owners in exchange for the government's promise to deliver Project water to these farms." Alpine I, 503 F. Supp. at 881. In addition to these conveyances, Congress authorized the withdrawal of over 200,000 acres from public lands to create the Project.

legislature included the provision exempting pre-1913 rights from impairment "to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act." *Manse Spring,* 108 P.2d at 315.

> Prior to 1913 the law said that the water users of that day would have and hold the use of such water until the same should be abandoned, and, as we have seen, in abandonment the intent of the water user is controlling. To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use it for a period of five years, irrespective of the intent, certainly takes away much of the stability and security of the right to the continued use of such water.

Id. at 316. In other words, a water right that can be lost through mere non-use is something less than a water right that may be lost only through intentional abandonment. The Nevada legislature did not want to diminish the pre-1913 rights.

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in *Manse Spring* that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source. Accordingly, with the purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land.

As there has been no factfinding regarding the individual water rights, we do not know at this time whether any of the water rights sought to be transferred were originally granted to the transferors by the United States prior to 1913 and further do not know if the water was beneficially applied.

Our conclusion that the individual rights at issue here did not vest in 1902 when the United States obtained Project-wide rights is not in conflict with our earlier decisions. The Engineer argues that this court has already held that the farmers' rights vested in 1902. In *Alpine I,* we stated:

> The district judge found that under the Nevada "relation back" doctrine, the 1903 statute did not affect the Project farmers' rights which had vested in 1902. We do not find this decision of the district court on the law of its own state incorrect.

697 F.2d at 855. We were considering the question of whether a 1903 Nevada statute limiting the quantity of water that could be diverted per acre of irrigated land could limit the water duties for Project farmlands. In the district court, the parties had *stipulated* for the purposes of that question that the priority date of the Newlands irrigation rights was July 2, 1902. *See* 503 F. Supp. at 885. Thus the issue of the date of vesting was not before the court; the issue was whether the statute could limit the duties *assuming* a priority date of 1902.

On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.

V.

[21] The district court erred by failing to consider the Tribe's claim that the water rights were never perfected and by approving the Engineer's findings on abandonment and forfeiture. In accordance with this opinion and the decision in *Alpine II,*[11] we remand for determination of

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[11]The issues of perfection, abandonment, and forfeiture in this case can properly be determined by either

whether: (1) the water rights appurtenant to the transferor properties at issue have been perfected, (2) the holders of the water rights sought to be transferred abandoned the water rights appurtenant to the transferor properties; and (3) the specific water rights sought to be transferred have been forfeited if the specific water rights vested after March 22, 1913.

REVERSED AND REMANDED

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the Engineer or a federal Water Master appointed by the district court. *Alpine II,* 878 F.2d at 1225. In *Alpine II,* we stated, "following remand, the district court is free either to refer this matter to the Water Master, or to rule on it in the first instance." *Id.* at 1228 n.15. We again leave to the district court's discretion the decision of the appropriate factfinder.

THE UNITED STATES OF AMERICA, Plaintiff, vs. ALPINE LAND AND RESERVOIR CO., et al., Defendant(s).

CIVIL NO. D-184-HDM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

27 F. Supp. 2d 1230; 1998 U.S. Dist.

September 2, 1998, Decided

September 2, 1998, Filed; September 3, 1998, Entered & Served

OPINION BY:

Howard D. McKibben

ORDER

On December 22, 1997, the Nevada State Engineer issued its Ruling On Remand # 4591. The United States and the Pyramid Lake Paiute Tribe ("Tribe") appeal that ruling.

The history of this litigation is detailed in *United States v. Alpine Land & Reservoir Co.,* 503 F. Supp. 877 (D.Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir. 1983) ("*Alpine I*"), *United States v. Alpine Land & Reservoir Co.,* 878 F.2d 1217 (9th Cir. 1989) ("*Alpine II*") and *United States v. Alpine Land & Reservoir Co.,* 983 F.2d 1487 (9th Cir. 1993) ("*Alpine III*"). In *Alpine III,* the Ninth Circuit remanded this action to the district court to make the following determinations, on a parcel-by-parcel basis, with respect to each transfer application at issue: (1) whether the water rights appurtenant to the transferor properties at issue have been perfected; (2) whether the holders of the water rights sought to be transferred abandoned the water rights appurtenant to the transferor properties; and (3) whether the specific water rights sought to be transferred have been forfeited, if the specific water rights vested or were initiated after March 22, 1913. The Ninth Circuit left it to this court's discretion whether to conduct the factual determinations itself or to appoint the State Engineer or a federal Water Master.

On April 13, 1995, this court issued the following order:

> This action is remanded forthwith to the Nevada State Engineer to consider all applications and make determinations on the issues of perfection, abandonment and forfeiture. Should the State Engineer decide additional evidence is required, he shall afford the parties the opportunity to present such evidence. The State Engineer shall then certify the record to this court to decide whether or not the findings of the State Engineer are based on the relevant facts and applicable law.

Thereafter, the Engineer issued a briefing schedule and a timetable for the exchange of evidentiary materials between the parties. On August 30, 1996, the Engineer issued Interim Ruling No. 4411, in which the Engineer concluded: 1) the Tribe was not precluded by the doctrine of res judicata from being heard on the issues of lack of perfection, abandonment and forfeiture; 2) the Engineer had the authority to consider the issues of lack of perfection, abandonment and forfeiture; 3) the Engineer would act on the applications before him as ordered by the court; 4) Nevada law does not shift the burden of proving lack of abandonment to the applicants upon the protestant's showing of an extended period of nonuse; and 5) NRS § 533.324, which became effective subsequent to the decision in *Alpine III,* precluded the need for perfection of the water rights that are the subject of the transfer applications prior to the transfer of said rights. On September 23, 1996, the Tribe filed a motion for partial reconsideration regarding the Engineer's ruling on perfection. In Ruling # 4591, the Engineer affirmed his conclusion that the court in *Alpine II* misinterpreted Nevada law when it held that all water rights in Nevada must be perfected prior to transfer. However, the Engineer further concluded that all unperfected water rights are not available to be transferred. The Engineer determined that if the Tribe proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether

that particular water right is still within the diligence phase of development. If the answer is yes, the unperfected water right can be moved; however, if the water right is not within the diligence phase, the unperfected water right is not available for the transfer, as it does not comport with the common law doctrines of due diligence and relation back.

Evidentiary hearings were held in 1996 and 1997. On December 22, 1997, the Engineer issued its Ruling on Remand # 4591, which considered fourteen (14) applications, consisting of fifty-six (56) transferor parcels.[1] In addition to the Engineer's factual findings on a

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[1] The Tribe's original appeal to federal court included Group 1 consisting of 58 applications; Group 2 consisting of 44 applications; and Group 3 consisting of 27 applications (129 total). In Alpine II, the Ninth Circuit held that the Tribe was precluded from challenging the forfeiture and abandonment of 104 of the applications because it failed to protest these before the Engineer. The 27 applications in Group 3 became the "original 25" after excluding Applications 47822 and 47830, which were not protested on the grounds at issue. The "original 25" applications were protested on the grounds of perfection, abandonment and forfeiture. Several permits granted or protests filed on the original 25 are no longer in existence. Permit 48422 was canceled by the Engineer and no timely appeal was taken. The Tribe withdrew its protests to Applications 48767 and 48866. Water applicants withdrew permits 48470, 48471, 48665 and 48827. Pursuant to a motion to consolidate Group 3 applications with Group 7, the Engineer held applications 47809, 48465, 48466, and 48669 aside to be heard later with the Group 7 applications. Thus, the Engineer's findings on 14 out of the original 25 applications are currently before the court.

The fourteen applications under consideration in Ruling # 4591 are: 47840 (Mills), parcels 1-21, 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48828 (Inglis), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 1-2; 48673 (Payne), parcels 1; 48424 (Dalton), parcel 1; 48666 (Craig), parcels 1-4; 48667

parcel-by-parcel basis, the ruling consisted of twelve (12) general findings of fact and four (4) general conclusions of law. Where applicable, the Engineer adopted and incorporated these general findings and conclusions when considering the issues of perfection, abandonment and forfeiture on a parcel-by-parcel basis.

Specifically, the Engineer determined that for thirty-eight (38) parcels, no water had been applied to beneficial use for periods ranging from five (5) years to thirty-six (36) years prior to the filing of the application to transfer the water right. For eight (8) other parcels, the Engineer found that the Tribe had proved that some portion of the land had not been irrigated for a substantial number of years, but that the Tribe had failed to present evidence of the exact location of the unirrigated land. On the remaining parcels, the Engineer found the Tribe had failed to prove nonuse of the water by clear and convincing evidence.

The Engineer also made findings regarding the land use of the transferor parcels. For a majority of the thirty-eight (38) existing places of use where the Engineer found no water had been applied to beneficial use and the eight (8) parcels where the Engineer found partial nonuse, the Engineer determined that the evidence before him clearly showed that they were comprised of paved highways and roads, natural vegetation, bare land, residential areas and canals and drains.

With respect to the issues of perfection, forfeiture and abandonment, the Engineer found that the water right on one (1) parcel had not been perfected, the water rights on two (2) parcels could not be transferred, and that no water rights sought to be transferred had been abandoned or forfeited. The three parcels which the Engineer concluded could not be transferred belong to Application 47840 (Mills), parcels 5, 11 and 12. As to parcel 5, the Engineer stated "the water right was never

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(Edson), parcels 1, 2, 5 & 7; 48825 (Emery), parcel 1; 48467 (Gerdamann), parcels 1-2; 48423 (Hoeksema), parcels 1-3; 48865 (Rambling River), parcels 1-7.

perfected on this parcel from the time of the contract in 1951 through the filing of the change application in 1984, a period of 33 years. The State Engineer further finds in the absence of evidence to the contrary a lapse of 33 years does not demonstrate due diligence in placing the water to beneficial use; therefore, there is no water right that can be related back under the doctrine of relation back and there is no water right available to be transferred from this parcel." With respect to parcels 11 and 12, the Engineer could not determine what the contract dates were. The Engineer concluded, therefore, that there was insufficient information to determine the Tribe's claims of lack of perfection, forfeiture or abandonment or to allow the transfer of the water rights.

On January 16, 1998, the United States filed its Petition for Review and Notice of Appeal of Ruling # 4591.[2] The United States specifically objects to the following general findings of fact and general conclusions of law: (1) General Finding of Fact I; (2) General Finding of Fact IX; (3) General Finding of Fact XII; (4) General Conclusion of Law II; and (5) General Conclusion of Law IV. In addition, the government contends that based on the Engineer's uncontroverted findings regarding the nonuse of water for a substantial period of time, combined with uncontroverted findings of a land use inconsistent with irrigation, more than half of the water rights at issue have been forfeited or abandoned.[3]

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[2]The applicants' contention that the United States lacks standing to appeal Ruling # 4591 is without merit.

[3]The United States specifically contends that the water rights sought to be transferred in the following applications are abandoned and/or forfeited, in whole or in part, and, therefore, ineligible for transfer:

47840 (Mills) --parcels 1-20 (except parcels, 5, 11 and 12 already invalidated)
48468 (Fritz) --parcels 1-6
48668 (Gaylord) --parcel 1

[1] On January 14, 1998, the Tribe filed its Notice of Appeal of Ruling # 4591. The Tribe appeals on the following grounds: (1) the Engineer should not act as a fact-finder on remand;[4] (2) the Engineer failed to apply the doctrine of beneficial use; (3) the Tribe was denied the discovery tools necessary to obtain important evidence; (4) General Conclusion of Law IV; (5) the rebuttable presumption of intent to abandon should have been applied; (6) General Finding of Fact XI; (7) General Finding of Fact X; and (8) certain factual findings regarding specific parcels.

No water right applicant has filed an appeal of Ruling # 4591. Specifically, no applicant has contested the Engineer's factual findings with respect to nonuse of water or the land use for the transferor properties.

DISCUSSION

[2-5] On remand, the district court "must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977).

48647 (Whitehead) --parcels 1 and 2
48672 (Lohse) --parcel 2
48666 (Craig) --parcels 1-4
48667 (Edson) --parcel 7
48467 (Gerdamann/Rebol) --parcels 1 and 2
48423 (Hoeksema/Cook) --parcel 1

The United States made no objections to the following transfer applications: 47840 (Mills), parcel 21; 48828 (Inglis); 48672 (Lohse), parcel 1; 48673 (Payne); 48424 (Dalton); 48667 (Edson), parcels 1, 2 & 5; 48825 (Emery); 48423(Hoeksema), parcels 2 & 3, and 48865 (Rambling River).

[4]On appeal, the Tribe has once again moved to disqualify the State Engineer on grounds of bias. After reviewing Ruling # 4591, however, the court believes the Engineer made the factual determinations in both an unbiased and commendable manner. The Engineer will remain as factfinder for all pending transfer applications.

The law of the case doctrine provides that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *U.S. v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997). However, a court may have discretion to depart from the law of the case if: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. *Id.* A court's "failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.*

This court entered an order of remand to the State Engineer for determinations on the issues of perfection, abandonment and forfeiture, which were to be based on relevant facts and applicable law. The Engineer is bound by the mandate set forth in Alpine III and the law of the case doctrine.

[6, 7] The Engineer's interpretation of the law set forth in Alpine III and any new questions of law will be reviewed de novo. *Town of Eureka v. State Engineer,* 108 Nev. 163, 165, 826 P.2d 948 (1992). The Engineer's factual findings, however, "shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." Alpine Decree, Administrative Provisions P7; NRS § 533.450(9). On issues of fact, the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the Engineer's decision. *Town of Eureka,* 108 Nev. at 165.[5]

I. Specific Objections to the Engineer's Factual Findings

In addition to its objections to the Engineer's legal conclusions on the issues of forfeiture and abandonment, the Tribe contests certain factual findings by the Engineer.

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[5]The court finds no authority for the appellants' contention that the Engineer's factual findings should be reviewed *de novo*.

[8] For eight (8) parcels, the Tribe submitted evidence that only a portion of the existing place of use had been irrigated.[6] The applications are: 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48825 (Emery), parcel 1 and 48865 (Rambling River), parcels 1-5. Generally, partial nonuse results in partial abandonment or partial forfeiture. *State v. Hagerman Water Right Owners,* 130 Idaho 727, 947 P.2d 400, 408 (Id. 1997).

However, on each of the parcels, the Engineer ruled that the Tribe had failed to provide clear and convincing evidence of the specific location of the unirrigated land. For example, on the issue of forfeiture on Application 48673 (Payne), parcel 1, the Engineer ruled:

> However, the State Engineer finds there is not clear and convincing evidence as to the exact location or the quantity of acres in the 3.2 acre portion of the parcel the protestant alleges were not irrigated from 1962 through 1984. Based on this lack of evidence of specific location of lands where non-use was alleged and the fact that the amount of land changed over time, the Protestant did not provide clear and convincing evidence as to the non-use on a specific portion of the 3.2 acres . . . .

The Tribe contends the Engineer had a "statutory obligation to

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[6]The government does not join in the appeal of these factual findings. However, there is a 9th parcel in which the Tribe submitted evidence that only a portion of the parcel had been irrigated-Application 48468 (Fritz), parcel 3. The Engineer found that from 1953 through 1972, the Tribe did not provide clear and convincing evidence as to non-use on any particular portion of the parcel. However, the Engineer also found that from 1973 through 1984, no water was placed to beneficial use on this parcel. Therefore, the government has also objected to the Engineer's determinations on this parcel, based on the latter part of the ruling. This objection is discussed below.

develop a full and complete record," and that the Engineer should have asked the Tribe or its witnesses to provide information regarding the exact location of the nonuse of the water. However, the burden was on the Tribe, not the Engineer, to present proof of nonuse.

The Engineer's conclusion that there is no clear and convincing evidence of nonuse on any specific portion of the disputed transferor parcels is supported by substantial evidence. Accordingly, the Engineer's findings as to Applications 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48825 (Emery), parcel 1; and 48865 (Rambling River), parcels 1-5 are affirmed.

[10] The Tribe also objects to the Engineer's factual findings on Application 48667 (Edson), parcel 1. With respect to forfeiture on that parcel, the Tribe's expert witness testified that the land was "bare land, trees" in 1962 and 1972, "bare land" in 1973 through 1975 and 1977, and "farm yard, structures" in 1980 and 1984. At the 1985 hearing, the applicant described the land use as housing. The Engineer gave greater weight to the applicant's description. The Engineer concluded, however, that the Tribe did not prove forfeiture or abandonment.

The Tribe is correct in its contention that whether the Engineer accepted the Tribe's or the applicant's land use description, there was no evidence of use of the water right to counter the Tribe's evidence of nonuse; that is, land that is occupied by housing cannot be irrigated. Based on this evidence, the Engineer erred in concluding that the Tribe failed to prove nonuse for the statutory period.

II. Perfection

In *Alpine III,* the court remanded for a determination of whether the water rights appurtenant to the transferor properties have been perfected. *Alpine III,* 983 F.2d at 1495.

[11] The law of Nevada, in common with most other Western States, requires that for the perfection of a water right for agricultural purposes, the water must be beneficially used by actual application on the

land, and the only transferable water right is one that has been appropriated to a beneficial use. *Nevada v. US,* 463 U.S. 110 at 126, 103 S. Ct. 2906, 77 L. Ed. 2d 509; *Alpine II,* 878 F.2d at 1226.[7]

[12-14] "To constitute a valid appropriation of water, there must be an actual diversion of it, with intent to apply to beneficial use, followed by an application to such use within a reasonable time." *In re Manse Spring,* 60 Nev.280, 286, 108 P.2d 311 (1940); NRS § 533.035; NRS § 533.070. "The nature of a water right is such that it takes time to perfect the right; when any work is necessary to complete the appropriation, the law gives a claimant a reasonable time to do it, and the appropriation is not deemed complete until the actual diversion or use of water." *Alpine I,* 503 F. Supp. at 885. In cases where beneficial use may be made of the water without diverting it, beneficial use alone is sufficient to constitute appropriation. *Nevada v. Morros,* 104 Nev. 709, 714, 766 P.2d 263 (1988).

The Tribe protested twenty-seven (27) parcels on the grounds of lack of perfection. The Engineer concluded that all but three parcels had been perfected on one or more of the following grounds: (1) a water right obtained pursuant to a contract dated prior to 1927 was perfected as a matter of law (General Conclusion of Law II) (20 parcels); (2) a water right was a pre-statutory vested right (General Finding of Fact XI) (7 parcels); and (3) the Tribe failed to provide sufficient evidence to prove lack of perfection (all parcels except 5, 11 & 12 of Application 47840).

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[7]In *Alpine III,* the court rejected the Engineer's argument that, under Nevada law, a water right need not be perfected prior to being transferred. *Alpine III,* 983 F.2d at 1492. In General Conclusion of Law III, the Engineer determined that the court had misinterpreted Nevada law. The Engineer based his conclusion on NRS § 533.324, which became effective subsequent to the decision in *Alpine III.* Because the appellants have not directly appealed this ruling and it has no direct bearing on the fourteen applications, the court will defer consideration of this issue until it bears on the issue raised by the facts of a transfer application.

Neither the Tribe nor the government contends that the Engineer erred in his factual determinations regarding lack of perfection. The United States objects only to General Conclusion of Law II, wherein the Engineer found "that the evidence supports the conclusion that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected." (Ruling at 41).

During the administrative hearings conducted in 1985 and 1997, the Engineer received documentary and testimonial evidence that the Bureau of Reclamation's practice while operating the Project from 1902 through 1926 was to require water right applicants to develop their land and put it into production, prior to the Bureau determining irrigability and awarding a water right contract. Based on this evidence, the Engineer concluded that water rights under contracts issued prior to 1926 were necessarily perfected by beneficial application for irrigation prior to the time the contract was issued.[8]

The United States contends that the Engineer's conclusion is not supported by substantial evidence. However, this conclusion does not affect the Engineer's factual finding that the Tribe failed to prove by clear and convincing evidence lack of perfection on twenty-four (24) of the transferor parcels (which the government does not protest). Accordingly, the court will reserve ruling on this issue until such time as it has a direct bearing on the Engineer's findings relative to perfection on specific transfer applications.

III. Forfeiture

On the issue of forfeiture, the court in *Alpine III* remanded the case for a determination of whether the specific water rights sought to be transferred have been forfeited, if the specific water rights vested or were initiated after March 22, 1913. *Alpine III,* 983 F.2d at 1495.

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[8]There was no evidence that TCID followed the policy after it took over the operation in 1927.

[15, 16] Under Nevada law, "the only requirement to prove forfeiture of water rights is to show a failure to use the water beneficially for five successive years." *Alpine III,* 983 F.2d at 1494; NRS § 533.060(2). Forfeiture thus differs from common law abandonment because an intent to relinquish a right is not a requirement. *In re Manse Spring,* 60 Nev. at 287. Because the law disfavors forfeiture, the protestant "bears the burden of proving, by clear and convincing evidence, a statutory period of nonuse." *Town of Eureka v. Officer of the State Engineer,* 108 Nev. 163, 169, 826 P.2d 948 (1992).

However, not all water rights are subject to forfeiture under Nevada law. NRS § 533.085, provides, in pertinent part:

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

Accordingly, in order to determine whether a right may have been forfeited, the Engineer must first determine whether and when the right vested and under which law appropriation was initiated. *Alpine III,* 983 F.2d at 1495. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS § 533.060.

The Tribe protested 40 out of the 56 parcels on the grounds of forfeiture. The Engineer determined that none of transferors had forfeited their water rights on one or more of the following grounds: (1) all water rights in the Project were initiated in 1902 and, therefore, not subject to the forfeiture provisions of NRS § 533.060 (General Conclusion of Law IV)

(all parcels); (2) the contract is dated prior to March 22, 1913 and, therefore, not subject to Nevada's forfeiture provisions (22 parcels); (3) the right was a pre-project vested right, which is not subject to Nevada's forfeiture provisions (11 parcels); and (4) no clear and convincing evidence of nonuse for the statutory period (14 parcels).

The Tribe and the United States appeal only the Engineer's General Conclusion of Law IV. The Engineer relied solely on this conclusion to find lack of forfeiture for the following eight (8) parcels: Applications 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1.[9]

In General Conclusion of Law IV, the Engineer stated that "all water rights requested for transfer pursuant to these transfer applications are changes of the 1902 water right decreed to the United States and all rights emanating therefrom were initiated in accordance with the law in effect prior to March 22, 1913. Therefore, the State Engineer finds the water rights are not
subject to the forfeiture provisions of Nevada Revised Statute § 533.060." (Ruling at 49). The Engineer made no determinations as to when each individual landowner took the first step to appropriate the water appurtenant to his land.

The Engineer contends that when a right was initiated (its priority date), depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law. The Orr Ditch Decree held that the water for the Project has a priority date of July 2, 1902. The Engineer thus

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[9]The government contends the Engineer also relied solely on General Conclusion of Law IV for Application 48467 (Gerdamann), parcel 1. In addition to relying on this conclusion, however, the Engineer determined that this water right was a pre-Project vested water right not subject to the forfeiture provisions. The government does not appeal that finding. Accordingly, this water right is not subject to forfeiture.

concluded that regardless of whether the water belongs to the farmers or to the United States, the first step taken to appropriate the water was on July 2, 1902. "Therefore, by that definition alone the water right for all Project users was initiated in accordance with the law in effect prior to March 22, 1913." (Ruling at 47).

The Engineer further concludes that while *Alpine III's* distinction between the water right obtained by the United States for the Project and the water rights appurtenant to particular tracts of land proved important as to when the water rights vested, "this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine." (Ruling at 47). The Engineer concluded that the United States appropriated and was decreed a 1902 water right for use on the entire Project and every single water right on the Project at issue was obtained pursuant to a contract with either the Bureau of Reclamation or TCID and uses the United States' 1902 decreed appropriation. Therefore, all of the Project farmers share proportionally in shortages during any water shortage year.

The interpretation of the term "initiated" is not in dispute. Clearly, NRS § 533.085 was intended to cover situations where steps had been taken to establish a water right in accordance with the law in effect prior to 1913, but the right had not yet been perfected. Once perfected, the right relates back to the first step taken to secure that right.

On the issue of forfeiture, the court in *Alpine III* only rejected the Engineer's argument that the water rights in the Project vested in 1902, when the United States obtained the water rights for the Project. In *Alpine III,* however, the court drew a distinction between the rights obtained by the United States and the rights appurtenant to particular tracts of land. That analysis is relevant to the interpretation of NRS § 533.085. In *Alpine III,* the court stated:

> The district court erred by assuming that all the water rights in question vested when the United States obtained water rights for

the Project in 1902. This amalgamation of water rights, obtained by the United States for the entire Project, is *not the relevant set of rights*. Instead, the rights at issue are the rights appurtenant to particular tracts of land that are the subject of the twenty-five contested transfer applications.

. . . .

The rights acquired by the farmers in the Project from the United States were more akin to newly appropriated water rights than to the rights such as those in Manse Spring that had remained appurtenant to a particular tract of land and had been passed with the land. In obtaining water rights from the United States, the Project farmers were really in the same position as farmers appropriating water from its source." *Id.* at 1496. (emphasis added)

In making this distinction, the court looked to the purpose of the forfeiture statute. The Nevada Legislature included the provision exempting pre-1913 rights from impairment " to refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act." *In re Manse Spring,* 60 Nev. at 288. The *Alpine III* court concluded that "with the purpose of the statute in mind, it would not make sense to grant to every farmer a Project water right with a 1902 vesting date regardless of when the farmer actually obtained the right to irrigate his land." 983 F.2d at 1495.

Under the constraints of *Alpine III* (which this court is bound to apply), the Engineer's conclusion that all of the individual landowners' rights were initiated in 1902 is erroneous. Accordingly, the Engineer should have made a determination as to when the individual landowner took the "first steps" to appropriate the water appurtenant to his land, and not rely on the 1902 priority date. The failure to do so was an abuse of

discretion. *Western Systems, Inc. v. Ulloa,* 958 F.2d 864, 866 (9th Cir. 1992).

The following applications should be remanded to the State Engineer to make a determination as to when the transferor or his predecessor took the "first step, " independent of the 1902 priority date, to appropriate the water appurtenant to his land: 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1. If there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, the court will apply the relation back doctrine and the water right will not be subject to forfeiture. If, however, the appropriation of the right was initiated subsequent to that date, the water right will be deemed forfeited. In the absence of any evidence of individual steps taken prior to March 22, 1913 to appropriate the water, the Engineer must use the date of the contract as the date the water right was initiated.

While this court is bound by the holdings in Alpine III, the court would observe that it agrees with the Engineer that there is only one set of rights on the Project. Every water right which derives from the Project was initiated by the actions of the United States beginning in 1902, when it posted notice that it was acquiring the water rights within the Lahontan Valley. As part of the initial act of appropriating the water, the United States agreed that it would enter into contracts with landowners, whereby the individuals could obtain water rights from the Project, provided that the water was put to a beneficial use. The appropriation initiated was completed when the stored water was put to beneficial use on lands owned by the Project farmers. As to Project water, therefore, the court believes that under the relation back doctrine, the 1902 priority date should be controlling on the issue of forfeiture. While the court must apply the law as set forth in *Alpine III,* the court respectfully urges that the court of appeals revisit this issue.

IV. Abandonment

The court in *Alpine III* also remanded for a determination of whether the holder of the water rights sought to be transferred abandoned the water rights appurtenant to transferor properties. *Alpine III,* 983 F.2d at 1495.

[18-21] Under Nevada common law, abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it." *In re Manse Spring,* 60 Nev. at 287. "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray,* 95 Nev. 782, 786, 603 P.2d 262 (1979). Intent to abandon a water right may be inferred from the acts of the water right holder. *Id.* The owner's nonuse of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. *Alpine III,* 983 F.2d at 1494 and n.8; *Matter of Franktown Creek,* 77 Nev. 348, 364 P.2d 1069 (1961). The Tribe bears the burden of proving clear and convincing acts of abandonment and intent to abandon. *Town of Eureka,* 108 Nev. at 169.

The Tribe protested 55 out of the 56 parcels on grounds of abandonment. For 38 parcels, the Engineer found substantial periods of non beneficial-use of the water, ranging from 5 to 36 years.[10] Further, the Engineer's findings with regard to land use on a majority of these thirty-eight parcels demonstrate that, during the periods in which no water was applied to beneficial use, the parcel itself had been converted to a land use which was incompatible with irrigation, such as highways and roads, residential housing, and canals and drains. Neither the appellants nor the appellees contested these

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[10]The 38 parcels are: Applications 47840 (Mills), parcels 1-20; 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 2; 48666 (Craig), parcel 1-4; 48667 (Edson), parcel 7; 48467 (Gerdamann), parcel 1-2; and 48423 (Hoeksema), parcel 1.

factual findings.

Despite these findings, the Engineer found that none of the transferors had abandoned his water rights on the fifty-five (55) parcels based on one or more of the following grounds: (1) no clear and convincing evidence of non-use for a lengthy period of time (i.e. more than 5 years) (17 parcels); (2) a water right holder could not have the intent to abandon something the individual did not know he owned until 1983, when the Supreme Court decided *Nevada v. U.S.* (General Finding of Fact IX) (all parcels); and (3) the transferor continued to pay the assessments and taxes due on the water rights and none were delinquent (all parcels).

On appeal, the Tribe and the United States contend that: (1) the Engineer may not take payment of assessments and taxes into consideration in determining intent to abandon; (2) the Engineer's General Finding of Fact IX is not supported by substantial evidence; and (3) the Engineer's uncontroverted findings of substantial period of nonuse of water, combined with a land use which is inconsistent with irrigation, is sufficient to find abandonment. The Tribe also contends that the Engineer erred when he declined to apply a rebuttable presumption of intent to abandon.

A. Rebuttable Presumption

[22] The Tribe contends that where there is a prolonged period of non-use, but no permanent improvement, the rebuttable presumption of intent to abandon applies, and the applicant should be required to come forward with evidence to explain and justify the non-use. The Tribe relies on authority from other western states to support its argument.

In Interim Ruling 4411, the Engineer rejected this argument and concluded that he "will not shift the burden to the transfer applicant to present evidence justifying the nonuse upon a mere showing by the [Tribe] of a substantial period of nonuse of a water right." The Engineer ruled that a "rebuttable presumption of abandonment is not Nevada law."

The court concludes the Engineer did not err in holding that a

rebuttable presumption does not apply under Nevada law. *Alpine III,* 983 F.2d at 1493, n.8. The Nevada Supreme Court has clearly stated that the owner's nonuse of a water right is only some evidence of an intent to abandon the right. *Franktown Creek Irrigation Co. v. Marlette Lake Co.,* 77 Nev. 348, 354, 364 P.2d 1069 (1961).

B. Payment of Assessments and Taxes

[23] The Engineer further found that for all of the applications at issue, the owners of the water rights had continually paid the assessments and taxes due and that none were delinquent. The Engineer combined this finding, with General Finding of Fact IX, to conclude that all of the water right owners lacked the intent to abandon their water rights.

The Tribe and the United States contend that the Engineer's reliance on the payments of assessments and taxes to show lack of intent to abandon is contrary to law and unsupported by the evidence. The appellants first argue that allowing the payment of the fees to preserve a water right in the face of nonuse is inconsistent with the usufructuary nature of water rights. The appellants further contend that the testimony does not support the Engineer's conclusions because all water right owners within the Project are assessed for each and every water-righted acre and payment is mandatory. The assessments are made without taking into consideration whether the landowner irrigates the land. If the taxes are delinquent, water is not delivered until the assessments are paid. Therefore, the appellants contend that the payment of assessments does not imply anything about the owner's intent to retain a right to irrigate all of his land.

However, abandonment is a question of fact to be "determined from all the surrounding circumstances." *Revert,* 95 Nev. at 786. Accordingly, the payment of assessments and taxes is a circumstance which the Engineer should take into consideration in determining intent.

C. General Finding of Fact IX

Next, the appellants contend that the Engineer's General Finding

of Fact IX is not supported by substantial evidence. In that finding, the Engineer concluded that for the purpose of determining abandonment of water rights, a person could not have had the intent to abandon a water right which that person did not know he owned until the Supreme Court's decision in *Nevada v. U.S.*, 463 U.S. 110, 77 L. Ed. 2d 509, 103 S. Ct. 2906 (1983). The Engineer's conclusion is based on his finding that: (1) the Orr Ditch Decree only mentions a water right belonging to the United States; (2) the Special Master in the Orr Ditch litigation treated the United States' water right as if it were a type of implied federal reserved water right not subject to the rules of due diligence or the doctrines of forfeiture and abandonment; (3) the Alpine Decree confirms the right of the United States to divert and store the Carson River for distribution to the individual farmers; and (4) the issue of ownership in the Project was not completely resolved until the lower court's decision in *Alpine I*, 503 F. Supp. 877 and, the resulting appeal and decision in *Nevada v. US*, 463 U.S. 110, 77 L. Ed. 2d 509, 103 S. Ct. 2906 in 1983.

The court concludes that this finding is not supported by substantial evidence because it misconstrues the type of knowledge required, there is no factual support in the record for the conclusion and it is based on an erroneous legal premise.

[25, 26] Abandonment is the voluntary relinquishment of a known right. *In Re Manse Spring*, 60 Nev. at 285. It is well-settled that "the concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states. In fact, the principle of beneficial use is so well entrenched in our legal lexicon that the Nevada Legislature declared almost a century ago that 'beneficial use shall be the basis, the measure and the limit of the right to the use of water.'" *Desert Irrigation Ltd. v. State of Nevada*, 117 Nev. 1049, 1056 (1997); NRS § 533.035. "When we speak of the owner of a 'water right' we use the term in its accepted sense; that is to say that the owner of a water right does not acquire a property in the water

as such, at least while flowing naturally, but a right gained to use water beneficially which will be regarded and protected as real property." *Application of Filippini,* 66 Nev. 17, 22, 202 P.2d 535 (1949). "Under the established tenet that a beneficial use is the measure and limit of a water right, when the necessity for the use of the water ceases to exist or is reduced, the extent of the water right is limited to the extent of the beneficial purpose which remains." *US v. Alpine Land,* 919 F. Supp. 1470, 1476 (D.Nev. 1996); NRS § 533.045. Thus, the nature of the water right is usufructuary. *W.A. Hutchins, 1 Water Rights Laws in the Nineteen Western States 440* (1974).

Accordingly, the type of knowledge required is not one of legal ownership, but of a right to the use of the water. There is an absence of evidence in the record to indicate that the Project farmers did not know that the contract gave them the right to use the water beneficially on their own land.

Nor can that inference be drawn from the fact that, immediately subsequent to the decision in *Nevada v. US,* the Project irrigators made applications to the Engineer to bring the records in compliance by correcting the places of use of their water rights to include actually irrigated acreage. At least two of the applicants allege that they were contacted by TCID to make the change applications. Indeed, it is alleged that TCID threatened to stop the flow of water until the applications were filed. No applicant testified or alleged that once he was aware of the Supreme Court's decision, he immediately filed a transfer application with the Engineer. Thus, there is no factual evidence to support the Engineer's conclusion that none of the applicants could legally abandon their rights prior to the *Nevada v. US* decision in 1983.

Further, as was stated in *Pyramid Lake Tribe v. Hodel,* the Engineer's argument that *Nevada v. US* "changed the rules" is a "dubious proposition." 878 F.2d 1215, 1217, n.2 (9th Cir. 1989). Both the court in *Alpine I* and the Supreme Court in *Nevada v. US* relied on holdings of

Ickes v. Fox, 300 U.S. 82, 81 L. Ed. 525, 57 S. Ct. 412 (1937) and *Nebraska v. Wyoming,* 325 U.S. 589, 89 L.Ed. 1815, 65 S. Ct. 1332 (1945). In *Ickes,* the Supreme Court stated that "although the government diverted, stored and distributed the water, the ownership of the water or water rights did not vest in the United States. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners." 325 U.S. at 597. Thus, any property right of the government in the irrigation works is separate and distinct from the property right of the landowners in the water right itself. *Id.* Therefore, neither *Alpine I* nor *Nevada v. US* changed the law in this regard. *Pyramid Lake,* 878 F.2d at 1217, n.2.

Accordingly, the Engineer's General Finding of Fact IX is not supported by substantial evidence. It was error for the State Engineer to rely on this general conclusion to support a general and specific finding that all of the appellees lacked the intent to abandon their water rights.

D. Evidence of Nonuse of Water and Improvements

The appellants contend that where the Engineer's uncontroverted findings of fact include a prolonged period of nonuse of water on a parcel and an improvement that precludes irrigation, the water right was abandoned and, therefore, may not be transferred. While the court generally agrees with this proposition, these findings must be considered in the context of this federal reclamation project.

The Project has always been controlled by the federal government or its agent, TCID. The evidence indicates that TCID was aware, and the government should have been aware, that for a number of years the farmers who had the right to irrigate their land pursuant to a water right contract were not always irrigating the particular land described in the contract. This fact was mostly due to the natural evolution and development of the farms over the century.

[28] Traditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed. *Bailey v. State,* 95

Nev. 378, 383, 594 P.2d 734 (1979); *Alpine II,* 878 F.2d at 1229 (Judge Noonan, concurring). The court finds that intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity.[11]

There are several factors which support this conclusion. First, there is evidence in the record that the procedures to transfer water changed at least three times over the years. At one point, an applicant was told that transfers were not allowed. Further, when the farmers were finally told by TCID that they were required to file a transfer application, they complied. More importantly, the individual who was legally entitled to use the water continued to beneficially apply the water to his land, albeit in a different location than what might have been described in the contract, to the extent the location was described in the contract.[12] Finally, there is no evidence that any of the landowners making intrafarm transfers used more water than the amount granted by contract with the government. Accordingly, the Engineer did not err in concluding that the water rights subject to intrafarm transfers will not be deemed to have been forfeited or abandoned.

[29] However, a transfer of a water right for value, from one property owner to another, who does not have any contractual right to Project water, does not warrant the same equitable considerations. As to these transfer applications, the legal principles of forfeiture and abandonment must apply.

In this conjunction, the Engineer erred in finding that payment of taxes, alone, was sufficient to establish the landowners lack of intent to abandon. Where there is evidence of both a substantial period of nonuse,

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[11]The United States does not protest the intrafarm transfers.

[12]The contracts often did not describe the exact location of the water
rights within any particular tract of land.

combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of nonuse, combined with the finding of a payment of taxes or assessments, the court concludes that the Tribe has failed to provide clear and convincing evidence of abandonment.

V. CONCLUSION

Accordingly, based on the foregoing findings and conclusions:

1) The Engineer's disallowance of transfer application 47840 (Mills), parcel 5, is affirmed.

2) Application 47840 (Mills), parcels 11 and 12, are remanded to the State Engineer for findings on the issue of perfection, based on the provision of a water right contract by either the applicant or TCID.

3) Application 48667 (Edson), parcel 1, is hereby remanded to the State Engineer for further findings on the issue of forfeiture and abandonment in accordance with this order.

4) The Engineer's findings as to Applications 47840 (Mills), parcel 21; 48828 (Inglis), parcel 1; 48672 (Lohse), parcel 1; 48673 (Payne), parcel 1; 48424 (Dalton), parcel 1; 48667 (Edson), parcels 2 & 5; 48825 (Emery), parcel 1; 48423 (Hoeksema), parcels 2 & 3; and 48865 (Rambling River), parcels 1-7 are affirmed.

5) All future transfer applications which concern an intrafarm transfer of a water right will not be subject to principles of forfeiture or abandonment.[13]

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[13]In support of his finding of non-forfeiture, the Engineer listed the fact that a transfer was within the same farm unit solely for Application 48865 (Rambling River), which was upheld on other grounds in this order. On remand, however, if there is evidence that any of the other thirteen applications are solely intrafarm transfers, the Engineer shall certify that finding to the court and the doctrines of forfeiture and abandonment will not apply.

6) The following applications are remanded to the State Engineer on the issue of forfeiture to make a determination as to when the transferor or his predecessor took the "first step," independent of the 1902 priority date, to appropriate the water appurtenant to his land: 47840(Mills), parcels 1 & 13; 48468 (Fritz), parcels 1-3 & 6; 48668 (Gaylord), parcel 1; and 48647 (Whitehead), parcel 1. If there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, the Engineer should apply the relation back doctrine and the water right will not be subject to forfeiture. If, however, the appropriation of the right was initiated subsequent to that date, the water right will be deemed forfeited. In the absence of any evidence of individual steps taken prior to March 22, 1913 to appropriate the water, the Engineer must use the date of the contract as the date the water right was initiated.

The Engineer is further ordered to make this determination for all pending transfer applications where: (1) the transfer of the water right was not an intrafarm transfer; (2) the water right is not a pre-project vested right; (3) the contract is not dated prior to March 22, 1913; or (4) there is clear and convincing evidence of nonuse for the statutory period.

7) The following applications are hereby remanded to the Engineer to take additional evidence which will bear on the transferor's intent to abandon: Applications 47840 (Mills), parcels 1-4, 6-10 and 13-20; 48468 (Fritz), parcels 1-6; 48668 (Gaylord), parcel 1; 48647 (Whitehead), parcel 1-2; 48672 (Lohse), parcel 2; 48666 (Craig), parcel 1-4; 48667 (Edson), parcel 7; 48467 (Gerdamann), parcel 1-2; and 48423 (Hoeksema), parcel 1. As previously indicated, additional evidence on the transferor's intent need only be offered by the applicant if there is both a finding of a substantial period of nonuse, combined with a finding of a land use inconsistent with irrigation. It is unclear from the record which of these thirty-eight parcels meets the criteria. If there is solely a finding of nonuse on any of these parcels, additional evidence need not be taken and the Engineer's findings

of non-abandonment will be affirmed.

The type of evidence provided may include, but is not limited to, the fact that the transferor or his predecessor was told by the United States or TCID or any of its agents that he could not file a transfer application or that he could make an informal transfer with their approval. However, the evidence may not consist solely of the transferor's testimony that he did not have the requisite intent to abandon. Should the transferor fail to present additional evidence on the issue of intent, then the Tribe has met its burden of demonstrating by clear and convincing evidence abandonment of the water right appurtenant to the land.

The Engineer shall certify his findings to the court.

As to the transfers approved by this order, the United States shall not prohibit delivery of water to those transferee parcels.

No. 99-16817

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JULY 5, 2001

CHIEF JUDGE MARY M. SHROEDER

JUSTICE JOHN KEY NOONAN

JUSTICE WILLIAM A. FLETCHER

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner

v.

ORR WATER DITCH COMPANY, et al.,

Defendants

and

TOWN OF FERNLEY; TRUCKEE-CARSON IRRIGATION DISTRICT; THE STATE ENGINEER,

Defendants - Appellees

On Appeal From the United States District Court

For the District of Nevada

Lloyd D. George, District Judge, Presiding

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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I. INTRODUCTION AND STATEMENT OF COUNSEL

Defendants-Appellees Truckee Carson Irrigation District (TCID) seeks rehearing *en banc* on the July 5, 2001 panel decision (Schroeder, Mary M., Chief Judge, Noonan, John Key, and Fletcher, William A.) in the case of *United States v. Orr Ditch Co.* , 99-16817, concerning issues of national significance with respect to all of the arid western United States, the applicable provisions of western water law as promulgated by the Reclamation Act of 1902 and subsequent state legislation in Nevada. The ruling by the majority of the panel conflicts with prior rulings of the United States Supreme Court and the Supreme Court of the State of Nevada relative to the initiation of the appropriation of water rights, the application of statutory forfeiture or abandonment to those rights, and ignores the "Relation-Back" doctrine of priority to the date of initial appropriation. *See Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 543-544.

The panel recognized that the forfeiture provision does not apply where the appropriation of the water right had been initiated in accordance with the laws prior to March 22, 1913. Nevada Revised Statute ("N.R.S.") § 533.085; *United States v. Orr Ditch, supra* at 8494-8495.

The panel, however, relying on the case of *United States v. Alpine Land & Reservoir Co.*, 983 Fed.2d 1487 (9th Cir. 1993) ("Alpine III") has found that for a water right to receive the protection of N.R.S. § 533.085, that water right must have vested, or an "individual landowner" must have "initiated" appropriation of that right, before March 22, 1913. *United States v. Orr Ditch, supra*, 8497. As noted by Justice Noonan, the Alpine III decision "was about vesting" whereas this case is about the "initiation" of appropriation. The Alpine III decision involves the waters of the Carson River. The water rights involved in the within action are a portion of "claim no. 3" of the general adjudication entitled *United States v. Orr Ditch Co.*, equity no. A-3 (D.Nevada 1944) ("Orr Ditch Decree") relating

to the Truckee River and is separate and distinct from the "Alpine cases."

TCID seeks *en banc* review with respect to the panel's interpretation and application of the concept of the "initiation by appropriation of the water right" as it relates specifically to the March 22, 1913 forfeiture statute, N.R.S. § 533.060. *En banc* review is appropriate because the majority ruling conflicts with Supreme Court precedent *Carter v. Derwinski* 998 F.2d 611, 613-614 (9th Cir. 1993) and Nevada Supreme Court rulings on state law – *Nevada Highway Patrol v. Nevada* 966 F.2d 534 (9th Cir. 1992). The overwhelming weight of authority recognizes that the first act of appropriation of the water of the Truckee River under the Reclamation Act of 1902 was iniitated by the United States on July 2, 1902 as trustee on behalf of all subsequent landowners within the Reclamation Project. *See Nevada v. United States*, 463 U.S. 110, 126 (1983).

A rehearing *en banc* is required because the panel's opinion overlooks the express provisions of the Reclamation Act of 1902, and the Orr Ditch Decree, conflicts with or is fully distinguishable from decisions of this Court in the "Alpine" cases, ignores established statutory law in the State of Nevada, conflicts with decisions of the Supreme Courts of the United States and Nevada on issues of exceptional importance and is necessary to maintain uniformity of the Court's decisions. The panel's opinion, if allowed to stand, will effectively rewrite Nevada and western water law, and effectively undermine the laws of initiation and appropriation of the water rights pursuant to the Reclamation Act of 1902. *See: Wells A. Hutchins, Water Report Laws in the Nineteen Western States*, Vol. 1, 383, 395 (1971). As the Supreme Court held in *Nevada v. United States*, *supra* at 123, this panel's ruling "would do away with almost a century of decided case law relating to the Reclamation Act of 1902 and the water rights in the public domain of the west" which was appropriated by the United States for the beneficial use and application of the settlers. The panel's decision, if allowed to stand, will impair, if not

destroy, the integrity of Congress' scheme and intent in its adoption of the Reclamation Act as interpreted by a multitude of United States and Nevada Supreme Court decisions.

The majority of the panel, while recognizing the concept of an "initiation of appropriation" from the source, ignores the practical reality that the United States was the only entity which in fact initiated the appropriation of the water from the Truckee River as specifically set forth in the Orr Ditch Decree. The ranchers and the farmers within the Newlands Project obtained water from the canals of the Truckee Division of the Reclamation Project, not from the Truckee River. They acquired the water directly by way of water right contracts, for consideration, entered into with the United States whereby it or its successor, TCID, agreed to deliver water through the delivery system which exists because of the first initiation and diversion of water from the Truckee River at Derby Dam in 1902. The Supreme Court in *Nevada v. U.S., supra,* has clearly established that the United States did not acquire an ownership interest in the water but rather initiated the appropriation as trustee for the benefit of the ultimate landowners. Further, it is physically impossible for any settler to initiate an appropriation of water from the Truckee River for application on farms located several miles to the east of the river.

The panel failed to recognize certain state statutory provisions which provide that once the water has been placed to a beneficial use, the individual farmer or rancher acquires a priority date which "relates back" to the "time when the first step was taken to secure (such right)." *Ophir Mining Co. v. Carpenter, supra* at 544. This decision constitutes the foundation of Nevada's water law.

Finally, the majority of the panel has relied upon the concept of an "investment-backed expectation" as being a requirement that an individual water right holder must establish in order to benefit from the exemption provisions of N.R.S. § 533.085. The majority of the panel equates the initiation of an appropriation of a water right with the concept that the

current water right holder or his predecessor must have had an "investment-backed expectation" as of the effective date of the statute in order to be exempt from forfeiture under NRS § 533.060. *United States v. Orr Ditch, supra,* 8496. The panel majority is attempting to introduce a legal concept which universally has been held by the courts to be only applicable to situations involving a regulatory taking and the right to compensation therefor. There is no authority that the purpose of the antiforfeiture statute was to exempt "investment-backed expectations." *U.S. v. Orr Ditch, supra*, 8508.

II. PETITION FOR REHEARING *EN BANC*

A. The Panel's Opinion Is Not Supported by the Express Terms of the Reclamation Act of 1902 Nor the Orr Ditch Decree

The United States, acting under the Reclamation Act of 1902, is the known initiating appropriator and predecessor in interest to the irrigators within the Newlands Project. The initiation of the appropriation and actual diversion of the water from the Truckee River was not done for the benefit of the United States; but, rather, for the benefit of the ultimate users. To find, as the majority has, that the initial act of appropriation by the United States would only benefit those who settled within the Newlands Project prior to March 22, 1913 contradicts the very essence and purpose of the Reclamation Act and is inconsistent with the provisions of the Orr Ditch Decree. In view of the application of the "relation back doctrine" recognized in Nevada since the Nevada Supreme Court ruling in *Ophir Mining Co. v. Carpenter*, *supra* at 544, the only logical interpretation of the Reclamation Act and the Orr Ditch Decree is that the United States did not acquire ownership of the water as a result of its appropriation for its own sake; but, for the benefit of the ultimate settlers within the Project who would, under State law, always have the benefit of the 1902 priority date.

In fact, § 8 of the Reclamation Act of 1902 provides in relevant part that "the right to the use of water acquired under the provisions of this

Act shall be appurtenant to the land irrigated, and beneficial use should be the basis, the measure and the limit of the right." 32 Stat. 390.

The first initiation of the appropriation of the water rights is synonymous with the initiation of the Project and was recognized in the Orr Ditch Decree, *supra,* in Claim No. 3:

> Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of Interior, on July 2, 1902 withdrew from public entry . . . the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River . . . and with the construction of the Truckee Canal . . . running from this dam a distance of 31 miles to Lahontan Reservoir . . . The lands so withdrawn for reclamation are naturally dry and arid and without the application of water, are of little or no value.

The United States initiated the first acts of appropriation from the Truckee River specifically for the agricultural development of the Newlands Project. The water was not beneficially used until subsequently conveyed and sold by the United States to the settlers who developed this arid region over the ensuing decades.

B. Although the Majority References *Nevada v. United States, supra,* Justice Noonan, in His Dissent, Notes that the Majority Silently but Effectively Departs from that Decision

The Court, in *Nevada v. United States, supra* at 123-126, has soundly rejected the reasoning of the majority in this case. There was only one act of initiation and that was by the United States in 1902 whereby it appropriated the water from the Truckee River and built the irrigation system not for its own use and benefit but for the exclusive use and benefit

of the irrigators who would follow. To the extent that the United States acquired an "ownership interest" in the waters of the Truckee River as of the date of the initiation of the appropriation by the United States, those rights were ultimately sold by way of agreement and transferred to the ultimate irrigators. Under Nevada state law, the act of appropriation is not sufficient to establish a valid water right. The water right must be put to a beneficial use within a reasonable period of time. The Supreme Court held in *Nevada v. U.S., supra* at 127, "the law of Nevada, in common with most other western states, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land. *Prosole v. Steamboat Canal Co.* 37 Nev. 154, 159-161, 140 Pacific 720-722 (1914). Such a right is "appurtenant to the land on which it is used." *Id.* at 160-161.

Nevada v. U.S., supra at 126, held as follows:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an appropriation within a reasonable time of the water to a beneficial use. *See Murphy v. Kerr*, 296 Fed. 536, 542, 544, 545. *See Ickes v. Fox*, 300 U.S. 82, 94-95."

Quoting *Ickes v. Fox, supra*, pages 94-95 (57 Supreme Ct. p. 416), the Supreme Court in *Nevada v.U.S., supra* at 124, further clarified its ruling in that case by holding:

> 'Although the government diverted, stored and distributed the water, the intention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was

made not for the use of the government but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. . . .

In *Nebraska v. Wyoming*, 325 U.S. 589, 613-634, the court stated:

> 'The Secretary of the Interior pursuant to § 3 of the Reclamation Act withdrew from public entry certain public lands in Nebraska and Wyoming which were required for the North Platte Project and the Kendrick Project. Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the project.

The Supreme Court in *Nevada v. U.S., supra,* concludes by finding that like most of the western United States, it is the landowner/irrigator who is the owner of the water right and not the government which established the Reclamation Project. Once the irrigator acquires the contractual right to receive water, agrees to pay for the delivery and places that water to a beneficial use, that water right becomes perfected and acquires a priority date based upon the first initiation of appropriation by the United States under the Reclamation Act. The Court held in *Nevada v. U.S., supra* at 127, as follows:

> "In light of these cases, we conclude that the government is completely mistaken if it believes that the water rights

> confirmed to it by the Orr Ditch Decree in 1944 for use in irrigating lands within the Newlands Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the government might see fit. Once these lands were acquired by settlers in the Project, the government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of the relevant state and the contracts entered into by the landowners and the United States make this point very clear."

There is nothing in the finding of the Supreme Court in any of the cases cited above which would lead to the conclusion that there are multiple initiations of appropriation of the same water rights from the Truckee River at Derby Dam. The appropriation was initiated by the United States under the Reclamation Act of 1902, in July of 1902. The United States never put that water to a beneficial use. Under the laws of the State of Nevada, in order to acquire a valid water right for irrigation purposes, the water must be ultimately placed into beneficial use by application to the land to which it ultimately becomes appurtenant.[1] There has been no allegation or showing by the protestants in the within litigation that those who perfected the water right did not do so in a timely and reasonable fashion. Unlike the opinions stated by the majority of the

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[1]Section 8 of the Reclamation Act provides: "That nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any State. . . " *Nevada v. U.S., supra* at 123.

panel, there is absolutely no authority which sustains the finding that each individual landowner must have taken affirmative steps to independently appropriate water from the river for his own use prior to March 22, 1913 in order to receive the protection from the forfeiture statute, § 533.060.

C. Neither N.R.S. 533.085 Nor Any Other Statute in Nevada Provides for Nor Requires Multiple "Initiation" of Appropriation of a Water Right

The majority of the panel opines that the "Alpine III" decision is applicable to the case at hand. The Alpine cases arise from the Alpine Decree and this litigation arises from the Orr Ditch Decree, *supra*. Furthermore, there is nothing contained in the Reclamation Act, the Orr Ditch Decree or any relevant Nevada statute which sustains the proposition that there would be "multiple initiations of appropriation" nor "multiple priority dates" for the same water originally diverted by the United States. As recognized in *Nevada v. U.S., supra* at 125, 126, the irrigators within the Project acquired their rights by contractual agreements with the United States and subsequently its agent, TCID, for water rights already appropriated. *Nevada v. U.S., supra* at 127, note 9, establishes that the contracts entered into between the Project owners and the United States, or TCID as successor acting pursuant to its agreement with the government, are similar to those addressed by the court in *Ickes v. Fox* and *Nebraska v. Wyoming, supra*.[2] The majority ruling herein cannot be reconciled with the contradictory authority of the Supreme Court, which has unequivocally held that the initial and only appropriation was by the United States in 1902. There is no rational or legal justification for a conclusion that one who made a water right application on March 21, 1922 should be treated differently from an individual who made application for a water right on March 23, 1922. Under Nevada law there

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[2]The quoted contracts provide that in water shortage years the amount of available water shall be proportionately shared – thus memorializing a common priority.

are only pre-statutory and statutory water rights. Pre-statutory rights are established by prior appropriation. Statutory rights arise under state law codified in 1913. None of the Newlands settlers applied for statutory water rights with a pre-statutory priority of 1902. Any post-1913 appropriations would have required applications to be approved by the State Engineer but this has never been done because the State recognizes the prior appropriations.

D. The Law of the State of Nevada Is Clear That Once a Water Right Has Been Put to Beneficial Use, the Priority Date Relates Back to the Time When the First Step Was Taken to Secure Such Right.

The majority of this panel ignores or misinterprets the plain language of NRS § 533.085, the specific provision of the Orr Ditch Decree and *Nevada v. U.S., supra*, which clearly indicate the United States initiated the appropriation of the water not for its benefit but for the benefit of all settlers. § 533.085(1) provides that "[N]othing contained in this chapter shall impair the vested right of any person to use the water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where the *appropriations have been initiated in accordance with the law prior to March 22, 1913*" (emphasis added). *See: In Re Manse Spring*, 60 Nev. 280, 108 P.2d (1940). "Claim No. 3" of the Orr Ditch Decree provides in relevant part that:

> "[S]ubject to prior appropriations and vested rights permitted and confirmed by the act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority date of July 2, 1902, through the Truckee Canal 1.5 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of land on the Newlands Project. . . "

Once the land was prepared for irrigation purposes and the water

delivered, the individual farmer would then put the water to a beneficial use, thus perfecting that water right. Under the long established law of the State of Nevada, once the water is placed to a beneficial use, its priority date "relates back" to the date when the first step was taken to secure that right. *See Ophir Mining Co. v. Carpenter*, 4 Nev. 534, 544 (1868). There can be no doubt that the first step of initiation of the appropriation began through the acts of the United States in 1902. This is particularly true under circumstances where the diversion of the water from the Truckee River was not to the benefit of the United States but the settlers. The majority of the panel misunderstood the facts and circumstances surrounding the development of the Newlands Project. The individual settlers who came to the valley in the years subsequent to 1902 did not appropriate water but rather contracted for water already appropriated. The majority of this panel, which has ruled that the individual must take steps to appropriate the water which "means that the individual must have (at the very least) contracted with the federal government prior to that date (1913) for delivery of the Project water," is in err. Most of the land which is in the Newlands Project was not settled until after 1913. Further, if this reasoning is correct, there would be a multitude of priority dates established within the Newlands Project. If that were in fact the case, water deliveries authorized by Claim No. 3 of the Orr Ditch Decree could not be made economically through the irrigation system built by the United States. This is particularly true in water shortage years. One would find that a multitude of deliveries would have to be made based upon the various priority dates of each individual user. All users on a particular canal would have to receive the guaranteed annual allotment of water if they had an early priority date, whereas later settlers would be denied water deliveries until earlier preferences had been fulfilled. The system simply cannot accommodate such an arrangement without massive water loss and waste. Consistent with the Alpine III decision, the appropriation of the rights were initiated in accordance with the law in effect prior to March 22, 1913. *Supra*, 1496.

E. Investment-backed Expectations Are Not Applicable to Water Right Appropriation and Perfection Issues Governed by State Law And, Based upon Prior Decisions, Has Been Limited to Regulatory Taking Claims on the Right to Damages

The majority of this panel has injected a new and rather unique theory to support its rationale of its decision. The Court relies upon the fact that absent an "investment-backed expectation" by the settlers on or before March 13, 1913, the provisions of NRS § 533.085 may not relieve the water users from the application of the forfeiture statute. There are 36 cited cases as of this date in the Ninth Circuit which deal with the concept of investment-backed expectations. None of these cases have any relationship or application to water law issues nor particularly to the appropriation and beneficial use of water within Nevada with the sole exception of the opinion which is the subject matter of this Petition.

It is inconceivable that any settler who made an investment either evidenced by money or labor in acquiring property within the Newlands Project would do so without the expectation that he or she would obtain water rights from the United States as a result of the Reclamation Act and the Orr Ditch Decree. It is much more logical to assume that the investment-backed expectations of all of the settlers within the Newlands Project was that they would be able to contract for and receive delivery of water from the Newlands Project and be subject to all of the same priorities, rights and title as any other individual who preceded them. As amply pointed out by Justice Noonan in his dissent, "[A]s the anti-forfeiture statute protects both vested rights and the first tentative step to vesting, there is no reason to attribute to the statute a purpose to protect investments."

III. CONCLUSION

The majority's ruling in this case is inconsistent with and cannot be reconciled with Nevada Law, the Reclamation Act of 1902 nor the U.S. Supreme Court rulings. The Petition should be granted for a rehearing *en*

banc.

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Respectfully submitted,

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& VAN ZANDT, LLP

s/_____

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